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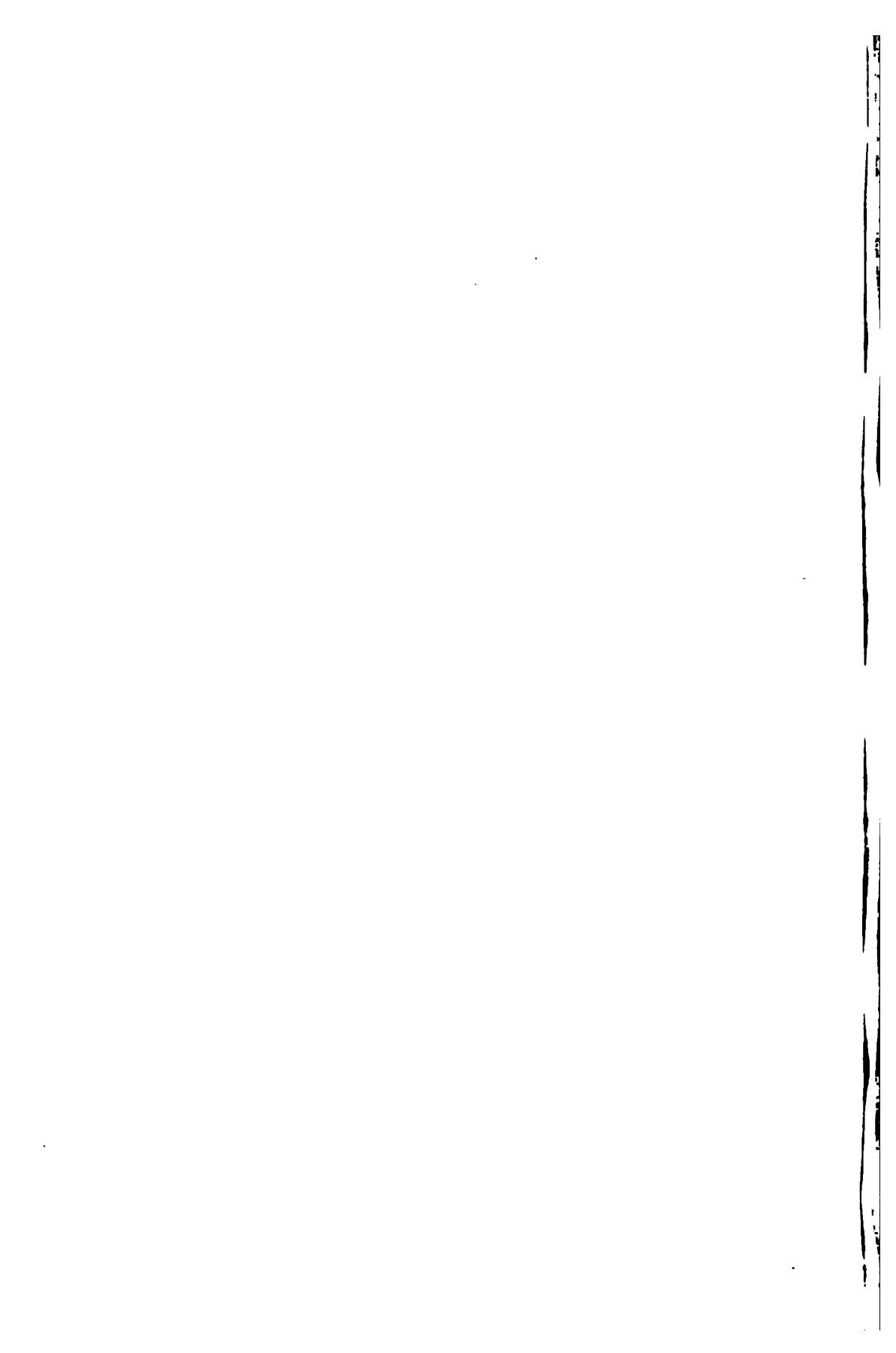
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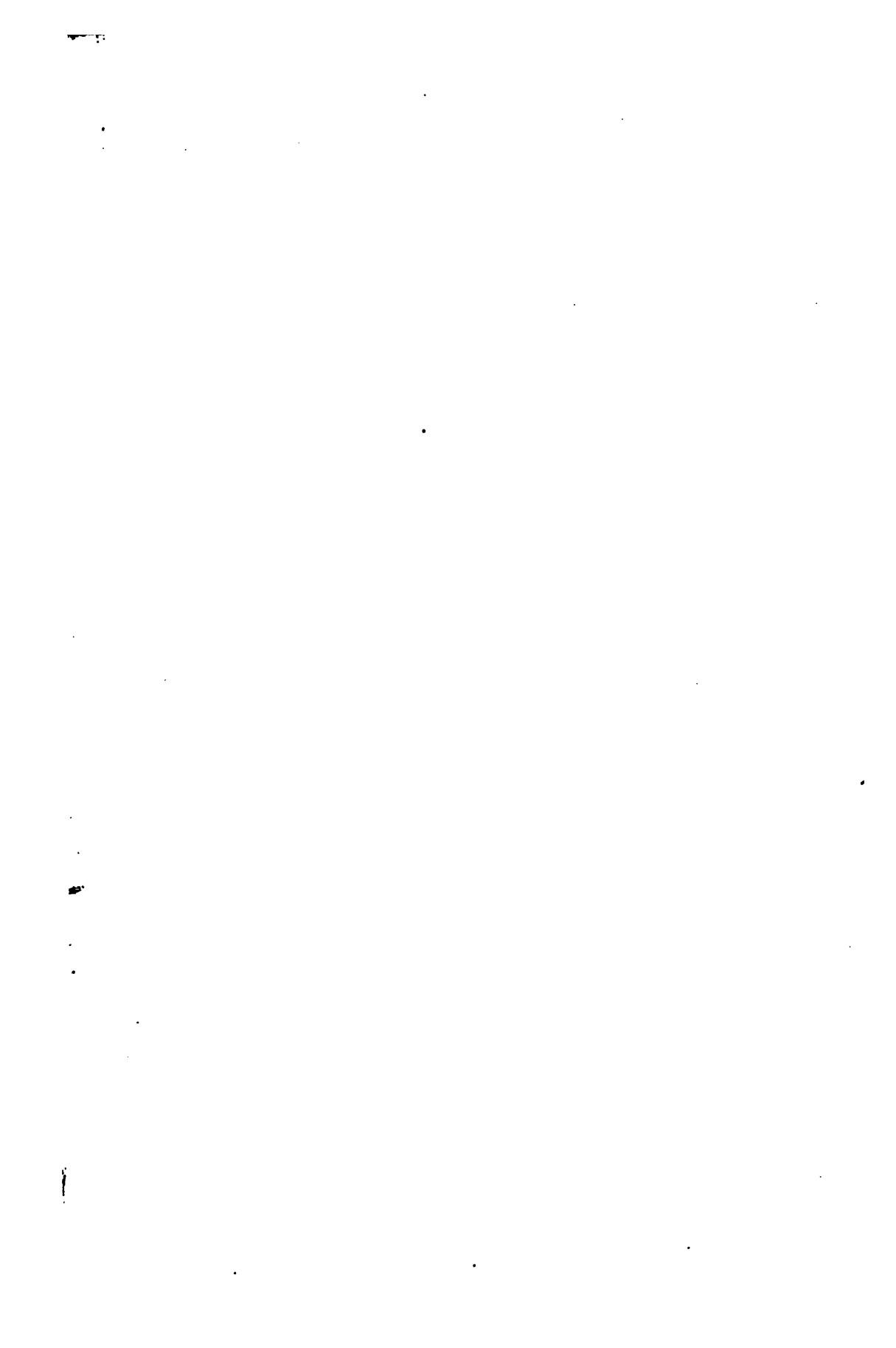


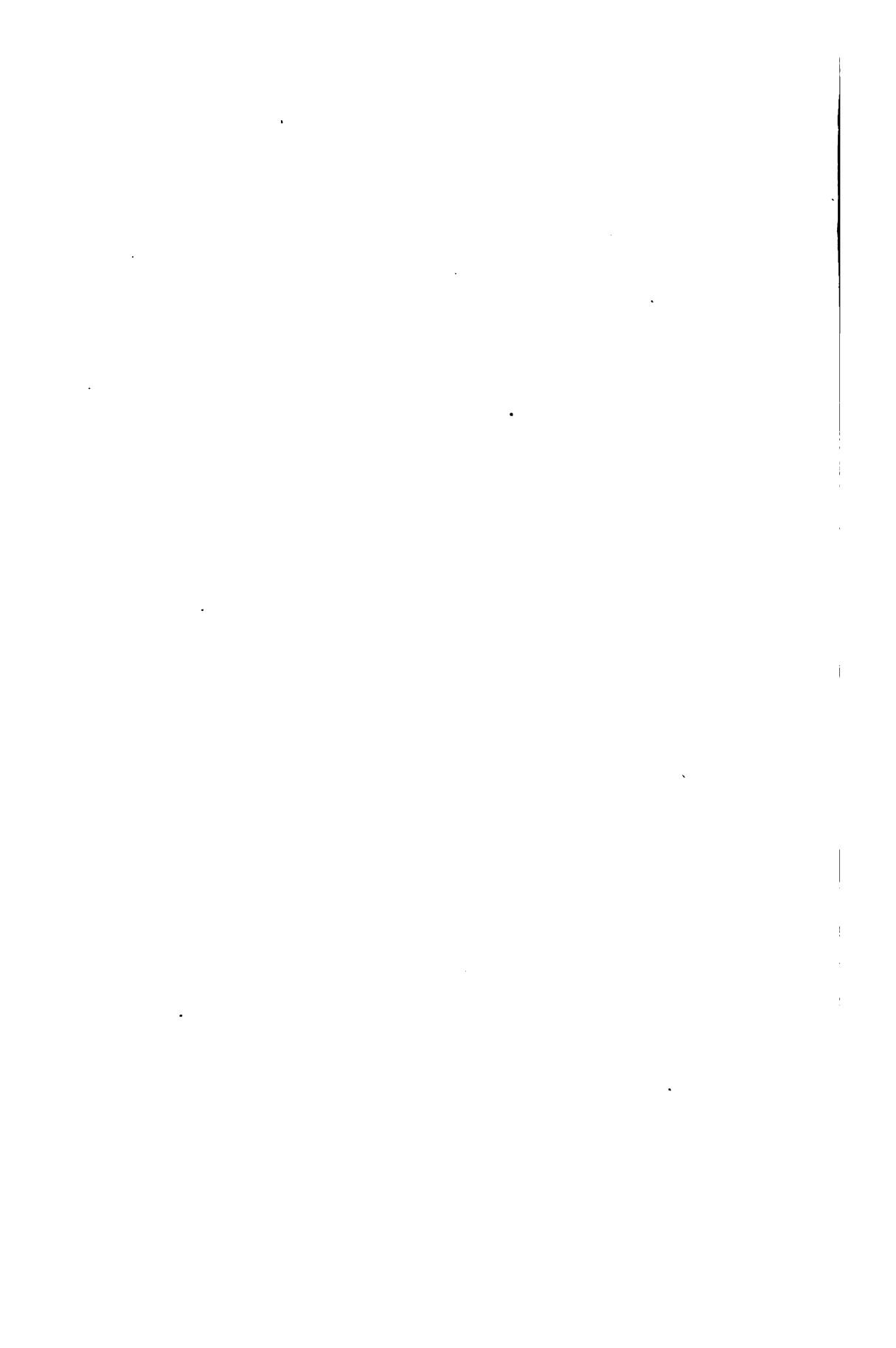
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S. 29

# Ohio Courts of Appeals Reports.

(Cited O. C. A.)

Volume XXXI.

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Cases Adjudged

in the

## Courts of Appeals of Ohio.

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THE OHIO LAW REPORTER COMPANY.  
1921.

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OCT 20 1921

# Judges of the Courts of Appeals of Ohio.

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HON. ALBERT H. KUNKLE, *Chief Justice*, Springfield, Ohio.  
HON. LEWIS B. HOUCK, *Secretary*, Mt. Vernon, Ohio.

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## FIRST DISTRICT.

*Counties—Butler, Clermont, Clinton, Hamilton and Warren.*

FRANCIS M. HAMILTON .....	Lebanon
WADE CUSHING .....	Cincinnati
R. Z. BUCHWALTER, .....	Cincinnati

## SECOND DISTRICT.

*Counties—Champaign, Clark, Darke, Fayette, Franklin, Greene,  
Madison, Miami, Montgomery, Preble and Shelby.*

H. L. FERNEDING .....	Dayton
ALBERT H. KUNKLE .....	Springfield
JAMES I. ALLREAD .....	Columbus

## THIRD DISTRICT.

*Counties—Allen, Auglaize, Crawford, Defiance, Hancock, Hardin,  
Henry, Logan, Marion, Mercer, Paulding, Putnam, Seneca,  
Union, Van Wert and Wyandot.*

PHILIP M. CROW .....	Kenton
KENT W. HUGHES .....	Lima
ERNEST N. WARDEN .....	Napoleon

## FOURTH DISTRICT.

*Counties—Adams, Athens, Brown, Gallia, Highland, Hocking, Jackson,  
Lawrence, Meigs, Pickaway, Pike, Ross, Scioto,  
Vinton and Washington.*

EDWIN D. SAYRE .....	Athens
WM. H. MIDDLETON .....	Waverly
Roscoe J. MAUCK .....	Gallipolis

FIFTH DISTRICT.

*Counties—Ashland, Coshocton, Delaware, Fairfield, Holmes, Knox,  
Licking, Morgan, Morrow, Muskingum, Perry, Richland,  
Stark, Tuscarawas and Wayne.*

ROBERT S. SHIELDS .....	Canton
FRANK N. PATTERSON .....	Ashland
LEWIS B. HOUCK .....	Mt. Vernon

SIXTH DISTRICT.

*Counties—Erie, Fulton, Huron, Lucas, Ottawa, Sandusky,  
Williams and Wood.*

SILAS S. RICHARDS .....	Clyde
CHARLES E. CHITTENDEN .....	Toledo
REYNOLDS R. KINKADE .....	Toleau

SEVENTH DISTRICT.

*Counties—Ashtabula, Belmont, Carroll, Columbiana, Geauga, Guernsey,  
Harrison, Jefferson, Lake, Mahoning, Monroe.  
Noble, Portage and Trumbull.*

L. T. FARR.....	Lisbon
JOHN POLLOCK .....	St. Clairsville
JAMES W. ROBERTS .....	Jefferson

EIGHTH DISTRICT.

*Counties—Cuyahoga, Lorain, Medina and Summit.*

C. G. WASHBURN.....	Elyria
WILLIS VICKERY .....	Lakewood
ALVAN F. INGERSOLL .....	Cleveland

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(Cited O. C. A.)

## Volume XXXI.

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Causes Argued and Determined in the Courts of  
Appeals of Ohio.

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### AUTHORITY FOR TAKING DEPOSITIONS NOT RESTRICTED.

Court of Appeals for Richland County.

IN THE MATTER OF DELILAH BERGER, EX PARTE, HABEAS CORPUS.

Decided, June 5, 1919.

*Depositions—Authority for Taking and Using Sharply Distinguished—  
Belief that the Taking of a Deposition is for Fishing Purposes—  
Not Ground for Refusal by a Party in Interest to Answer.*

Habeas corpus does not lie for release of a witness who has been committed for refusal to answer questions when the taking of his deposition was attempted in a case in which he is a defendant, where the sole ground for the refusal is that the purpose of taking the deposition is to discover defendant's evidence.

*Brucker & Henkel*, for plaintiff in error.  
*C. H. Workman*. contra.

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\*Affirmed by the Supreme Court March 16, 1920.

**SHIELDS, J.**

The following facts appear of record:

On February 13, 1919, one Louis Frietchen commenced an action in the court of common pleas of said Richland county against John Berger, Delilah Berger and Della M. Berger, for damages growing out of the alleged negligent, careless and unlawful operation of an automobile upon certain streets in the city of Mansfield, in said county, on September 25, 1918, whereby the said Louis Frietchen was struck and thrown violently to the street and permanently injured, as is more particularly described in his petition.

On February 26, 1919, and after service of summons was made upon the said defendants in said action, said plaintiff's attorneys caused subpoenas to issue for the said defendants, Delilah Berger and Della M. Berger, commanding them to be and appear before one Wm. F. Black, a notary public in and for said Richland county, on the 28th day of February, 1919, at the law office of said plaintiff's attorneys in the city of Mansfield, in said county, to be examined as witnesses as on cross-examination, in behalf of the said plaintiff, in said cause. That pursuant to such process issued, the said defendants duly appeared at the time and place stated, when the said "Delilah Berger being duly sworn was introduced as a witness as upon cross examination," who after making answers to the usual preliminary questions as to her residence and occupation, was interrogated as to the accident occurring at the intersection of the streets mentioned and at the place mentioned, as stated in said petition, when she refused to answer for the reasons hereinafter stated in said deposition and who on the advice of her counsel made and filed at said time with the said notary public the following affidavit:

"No. 13806. Louis Frietchen, Plaintiff, vs John Berger et al, Defendants.

**"AFFIDAVIT.**

"State of Ohio, Richland County, ss.:

"Delilah Berger, being by me first duly sworn says that she is one of the defendants named in the above style cause of

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action, and the daughter of the defendant, John Berger herein, that the cause in which her deposition is to be taken or to be attempted to be taken is now pending in this court; that she will of necessity be a witness in the cause, and will be present to testify in the case and to subject herself to examination and cross examination; that the issues in the case have not yet been made up; that no answer has been filed to the petition of the plaintiff herein, Louis Frietchen, and that the time within which defendants are required to plead has not yet expired; that she is informed by her counsel and believes the fact to be that her deposition is not about to be taken in good faith and for the purpose of being used as testimony in said cause but for the purpose of finding out what her testimony and that of the defendants will be at the trial, in advance of trial, and solely for the purpose and with the single object to discover the manner in which the defendants' defense herein is to be established, and to compel the defendants herein to disclose in advance before trial their evidence which relates exclusively to said defendants' defense.

"That she is now and has been for a number of years a resident of the county of Richland and the city of Mansfield and expects to be a resident of this county and this city; that she is in robust health, is not suffering from any infirmity, and does not expect to be imprisoned, and that her testimony is not required on any motion made or to be made but is asked wholly to discover the merits of the defense to plaintiffs' action.

"And further affiant sayeth not.

"Delilah Berger.

"Sworn to and subscribed before me this 4th day of March, 1919.

"Wm. F. Black,  
"Notary Public."

The grounds set forth in said affidavit being held by said notary public to be insufficient to excuse and relieve the said witness from answering said interrogatories, said notary public thereupon further inquired of said witness:

"Q. You refuse to answer any and all questions pertaining to this inquiry for the reasons stated by your counsel?

"A. Yes.

\* \* \* \* \*

"Judge Brucker. I ask that she be committed for contempt.

"Mr. Workman. I insist that the other method be taken, that the deposition be transmitted to the court with the affidavit

of the witness and the counter-affidavit, if plaintiff so desires, with the request of the court to give instructions to the notary public as to the questions involved.

"The notary thereupon ordered and adjudged that the witness Delilah Berger be committed to the jail of Richland county, Ohio, for contempt, to which ruling counsel for the witness excepted."

That afterward, upon application made, a writ of habeas corpus was issued by the court of common pleas of said county, directed to the sheriff of said county to produce the person of the said Delilah Berger in court, and having done so, said court upon a hearing had of the proceedings herein ordered and adjudged "that the said Delilah Berger be forthwith discharged from her said detention," whereupon a petition in error was filed in this court to review and reverse said judgment of said court upon the grounds therein stated, among which is that said judgment is contrary to law.

It appears that the sole question presented upon the record is the legal question of the plaintiff below to take the testimony by deposition, in advance of a trial, of the said Delilah Berger, a party defendant to said action and served with process, and to have the said Delilah Berger true answers make before a notary public to all proper inquiries made of her, as upon cross-examination, in behalf of said plaintiff, touching the accident upon which said action is based.

The chancery practice of filing what was known as an equity bill for discovery appears to have been superseded by statutory legislation and as a substitute therefor Section 11497, General Code, was enacted by the Legislature which provides that:

"At the instance of the adverse party, a party may be examined as if under cross-examination, either orally, or by deposition, like any other witness. If the party be a corporation, any or all of the officers thereof may be so examined at the instance of the adverse party. The party calling for such examination shall not thereby be concluded but may rebut it by counter testimony."

In addition to the foregoing, interrogatories are authorized to be annexed to a pleading under Sec. 11348, G. C. Under

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the same Chapter (3) relating to evidence Section 11525, General Code, provides that:

"The deposition of a witness may be used only when it is made to appear to the satisfaction of the court that he does not reside in, or is absent from, the county where the action or proceeding is pending, or by change of venue, is set for trial; or that he is dead, or from age, infirmity, or imprisonment, is unable to attend court; or that the testimony is required upon a motion or where the oral examination of the witness is not required."

It will thus be seen that the first of the statutes cited provides for an examination of a party to an action by deposition, and by the last statute cited it is provided when the deposition of a witness may be used. One authorizes the taking without any restrictions, and the other the use of a deposition, subject to certain conditions. Here we have to deal with the first proposition only. As was said by Judge Davis in announcing the opinion in *In re Rauh et al*, 65 O. S., 128, 135:

"The right to take depositions should be carefully distinguished from the right to use them."

The question at issue here involves the right to take the deposition of the said Delilah Berger, and not the use of the deposition when taken. The law designates different officers before whom depositions may be taken, among them, a notary public, whose powers are not judicial, and therefore a notary public is not authorized to pass upon and determine the materiality or competency of testimony offered, but whose duty it is to reduce such testimony to writing and transmit it to the court wherein such action is pending. As was held in *DeCamp v. Archibald*, 50 O. S., 618 (Syl. 3).

"Where the question propounded involves no question of privilege on the part of the witness, it is his duty to answer, if ordered by the notary public to do so. The question of its competency is a matter for the determination of the court on the trial of the action in which the evidence is taken; and if he refuses to do so, when ordered, he may be committed as a contumacious witness."

An examination of the record herein shows that after the witness appeared before the notary public for examination, pursuant to the command of the subpoena served on her, and after she was sworn to testify, her counsel objected to the taking of her testimony "for the reason that the object of the deposition is to discover defendants' testimony," which objection was overruled. Then followed the interrogatories and answers as appear in said deposition, when said objection was repeated and overruled, after said affidavit was filed. Hence it appears that the sole objection to the taking of said deposition was based on the ground that it was "to discover defendants' testimony." If it were a matter upon which we were required to speak, we would unhesitatingly record our dissent from the wisdom of the statute referred to, for reasons not necessary here to state, but it sufficient to say that the individual opinion of courts can not be substituted for the legislative will when enacted into law, and it is the duty of courts to announce the law as written into our statute books. The question made here is not one of professional ethics but of statutory law—a statute requiring enforcement as interpreted by the highest court of this state. In this connection we have examined the numerous authorities which the diligence and research of counsel have brought to our attention, and we think that the question presented has been met by like questions passed upon by the Supreme Court of this state and are therefore decisive of the question in controversy here. *In re Rauh et al*, 65 O. S., 128, already referred to, when Section 5266, R. S., now re-enacted as Section 11497, G. C., was under consideration it was held that:

"A deposition may be taken at any time after service of summons upon the defendant in the action, but it can be used on the trial only in the cases prescribed in Revised Statutes, Section 5265; and the deposition of any witness, whether a party to the action or not, may be so taken."

In *Ex parte Malcolm Jennings*, 60 O. S., 319, it was held that:

"A witness whose deposition is being taken before an officer may refuse to testify to facts not relevant to the issues in the

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case in which the deposition is to be read, if the disclosure of such irrelevant facts would be injurious to the business of the witness; and, if imprisoned by the officer for such refusal, he may be discharged on habeas corpus."

Here the authority of a notary public committing a witness for refusing to answer a question of personal privilege, and an incompetent question was involved, and not the right of a party to take the deposition of an opposing party.

*Ex Parte Schoepf*, 74 O. S., 1, was cited and relied on by counsel for the defendant in error. The first two paragraphs of the syllabi in said case are as follows:

"The clause in Section 5247, Revised Statutes, 'which he may be compelled to produce as evidence,' and as used *In re Rauh*, 65 Ohio St., 128, must be construed with Section 5289, Revised Statutes, and is therefore limited to evidence pertinent to the issue, in cases and under circumstances where a party might heretofore have been compelled to produce the same by the ordinary rules of proceeding in chancery."

"The rule in chancery as to compelling the production of documents for the purpose of evidence and inspection was and is that a party is entitled to a discovery of such facts or documents in his adversary's possession or under his control, as are material and necessary to make out his own case; but that this right does not extend to a discovery of the manner in which the adverse party's case is to be established, nor to evidence which relates exclusively to the adverse party's case."

It is true that a reading of the last clause of the second syllabus cited, unexplained, is susceptible of an interpretation favorable to the contention made by counsel for the defendant in error, but an examination of the opinion in said case, in connection with the facts, does not warrant such interpretation. Here it was sought to obtain from the witness, who was the claim agent of the traction company, answers to certain questions which were conceded to be immaterial, irrelevant and incompetent because they called for hearsay testimony and therefore "would be inadmissible if offered to a jury on the trial of a case, because of the rule against hearsay." Further, it appeared that said witness had delivered to the counsel for said

traction company reports of the conductor and motorman of the car made to *him* of the accident and said reports were therefore private and privileged. The judge announcing the opinion in this case in referring to the Jennings and Rauh cases says:

"Accordingly it was nowhere said in either of the decisions of this court already referred to, nor was it intended to be inferred, that a witness might be compelled to surrender to his adversary a coveted document, before the right to compel production of it had been submitted to the judgment of a competent tribunal."

The question here put related to the inspection of documentary evidence, and the right given an adverse party to obtain such inspection is specially authorized by statute. At best, the contents of said reports could not be orally given by the witness when they were in the possession of another, and it is apparent that they related exclusively to the adverse party's case. Said reports were held to be privileged and, falling within that class of testimony, the court held that the refusal of the witness to produce said reports was not "lawfully ordered." Not so in the case at bar where the witness refused to answer questions solely upon the ground that an effort was being made, as claimed, "to discover defendants' testimony." Of course we are not at liberty to speculate upon what the status of the case will be when the issues are fully made up between these parties, but in the light of the cases decided by the Supreme Court of this state we are of the opinion that the questions put to and declined to be answered by the witness, Delilah Berger, were both competent and pertinent under the petition filed, that the action of the notary in ordering said witness to be committed to jail as for contempt in her refusal to answer said questions was within the lawful exercise of his authority, and it follows that the judgment of the court of common pleas in discharging the said Delilah Berger from custody in said habeas corpus proceeding must be reversed, and it is so ordered. Exceptions.

HOUCK and PATTERSON, JJ., concur.

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Miami County.

**TIME FOR FIXING VALUE OF LAND APPROPRIATED UNDER  
THE CONSERVANCY ACT.**

Court of Appeals for Miami County.

THE MIAMI CONSERVANCY DISTRICT V. ELSEY BOWERS ET AL.

Decided, May 21, 1919.

*Appropriation—Application of the Three-Fourths Jury Law—Value of Land Taken to be Fixed as at the Time of the Trial—Taxation of Jury Fees.*

1. The three-fourths jury law applies to appropriation cases under the conservancy act.
2. In an appropriation proceeding under the conservancy act the market value of the land taken should be estimated as of the time of the trial of the appropriation case, and not as of the time of the confirmation of the appraisement in the original case establishing a conservancy district.
3. Jury fees in an appropriation case may be taxed as costs in said case.

*O. B. Brown, A. B. Campbell and L. H. Shipman*, for plaintiff in error.

*Broomhall & Broomhall*, for defendant in error.

*R. A. Kerr*, Prosecuting Attorney for Miami county, as to the question of taxation of costs.

KUNKLE, J.

Heard on error.

The original action was an appropriation case under the Conservancy Act. The appraisement in the Conservancy proceeding was approved on June 30, 1917. An appeal was taken by the property owners under the Conservancy Act and the proceedings on appeal were had in the court of common pleas of Miami county. The trial resulted in a verdict for the property owners considerably in excess of the amount of the appraisement. The trial court instructed the jury that they might return a

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\*Affirmed by the Supreme Court, July 8, 1919.

verdict under the three-fourths jury law, but the verdict was concurred in by the entire jury. Motion for a new trial was overruled and judgment was rendered on the verdict. The case has been brought to this court upon the petition in error of the Conservancy District.

Three questions are presented by the arguments and briefs of counsel, to-wit: (1) Whether the three-fourths jury law applies; (2) Whether the marked value of the land taken should be estimated as of the time of the confirmation of the appraisement in the original case, or as of the time of trial of the present case; (3) Whether the jury fees can be taxed as a part of the costs in the case.

We doubt whether the application of the three-fourths jury law is raised in this case in view of the unanimous verdict.

This court, however, in the case of the *Conservancy District v. Mitman* in Greene County has recently held that the three-fourths jury law applies to an appropriation case under the Conservancy Act. A copy of that opinion has been furnished to counsel.

We have re-examined this question again in connection with the arguments and briefs of counsel in the present case, and have reached the conclusion that the decision in the Mitman case should be adhered to and followed.

The question as to the time for estimating the market value of the property taken is a very interesting—and in view of the recent fluctuation of values—a very important one. There is a conflict in the decisions of the trial courts in the various counties of the Conservancy District.

The trial court in the case at bar held that the market value at the time of the trial controlled. This question involves a construction both of the constitution and of the Conservancy Act.

Article 1, Section 19, of the Ohio Constitution provides:

"Private property shall ever be held inviolate but subservient to the public welfare. \* \* \* Where private property shall be taken for public use a compensation therefor shall first be made in money, or first secured by a deposit of money; and such compensation shall be assessed by a jury, etc."

The Constitution of 1802 did not contain the provision that the money should first be paid or deposited. Under the old Constitution abuses arose which were intended to be remedied by the Constitution of 1851 above quoted.

Under our present Constitution, therefore, the payment or deposit of compensation is a prerequisite to an appropriation except in certain cases specifically mentioned in the Constitution.

This case does not come within the exception, but is governed by the general provisions of Article I, Section 19, above quoted.

It is urged that a fair construction of the Conservancy Act justifies the contention that the Legislature intended to make the appropriation complete at the time of the confirmation by the court.

While there is some force in this contention, if we were to consider the Conservancy Act alone, yet in case of doubt the legislative act should be construed in harmony with the Constitution. Under this rule of construction we think it would follow that both under the Constitution and the Conservancy Act the taking occurs when the compensation is either paid or deposited.

The nearest approximation to the time of the taking would therefore be the time of the trial before a jury in the appeal case.

It is urged that the present proceeding was an appeal from the confirmation of the appraisement in the original conservancy case and that therefore the value should be estimated as of the date of the judgment appealed from. This argument would have considerable—and perhaps controlling force—if we were considering only the Conservancy Act, but it must yield, in our judgment, to the superior force of the constitutional provisions. The jury trial provided for in the appeal case is the execution of the constitutional provision and such trial consummates the right of the Conservancy District to make the appropriation.

It is strongly urged by counsel for plaintiff in error that the proceeds of special assessments and of bonds issued in the conservancy proceedings and remaining under the control of the

court, constitute a deposit within the meaning of the constitution. We concede there is some plausibility in this contention, but after a careful consideration of the arguments and reasons advanced by counsel we think a fair compliance with the constitutional provision would require either a payment of compensation to the owner for the specific property or a special deposit for the specific property, payable directly to the owner.

We do not think a general fund under the control of the court, not specifically appropriated in the manner above stated, would meet the requirements of the Constitution.

We are therefore of opinion that the rule adopted by the trial court in this respect is correct.

The trial court taxed jury fees as part of the costs in the case, and this is objected to by the Conservancy District. The authority for so taxing the jury fees is found in Section 11089, G. C. This section is a part of the statutes regulating proceedings in the probate court by private corporations to appropriate land.

The Conservancy Act adopts these provisions to control proceedings under the Conservancy Act.

It is claimed that Section 11091, G. C., of the Probate Court Act would except Conservancy proceedings. The part relied upon is as follows:

"The provisions of this Chapter shall not apply to proceedings by state, county, township, district or municipal authorities, to appropriate private property for public use, or for roads or ditches \* \* \*."

This exception was intended to exclude the public authorities therein named, but the Act creating the Conservancy District and providing for appropriation proceedings in such cases, expressly adopts the statutes relating to appropriation proceedings in the Probate Court, and being a special provision applying to Conservancy cases would prevail over Section 11091, G. C. Section 11091, G. C., is a general provision, while the Conservancy Act is a special provision affecting conservancy proceedings.

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In our opinion, the jury fees in the case at bar were properly taxed as part of the costs.

Finding no prejudicial error the judgment of the lower court is affirmed.

ALLREAD and FERNEDING, JJ., concur.

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**DAMAGE TO ABUTTING OWNER IN ELIMINATING A  
A GRADE CROSSING.**

Court of Appeals for Franklin County.

ETTA LEWIS AND EMORY LEWIS v. LEVI E. DOUGLASS ET AL AS  
COMMISSIONERS OF FRANKLIN COUNTY, OHIO.

Decided, November 6, 1919.

*County Commissioners—Official Acts Distinguished from Those Purely Individual—Change in the Grade of a Road not an Ultra Vires Act—Whether a Reasonable Grade was Established a Question for the Jury.*

1. Where county commissioners, as a part of a plan to eliminate grade crossings over steam railroads, establish the grade of a road or highway and cut down the surface thereof three or four feet in front of property which has been improved with reference to such surface grade, the owner of such real estate can recover damages from the county, if any damage results from such change of grade and if same is found by the jury to be an unreasonable grade.
2. Where such unreasonable grade has been actually made by the county commissioners, the fact that such commissioners made no formal record of the order and proceedings establishing the same is not a defense on behalf of the county, nor does such fact relegate the property owner to an action exclusively against the county commissioners as individuals.

*T. E. & J. M. Lewis*, for plaintiffs in error.

*Hugo N. Schlesinger*, Prosecuting Attorney, and *John H. Summers*, Assistant Prosecuting Attorney of Franklin County, for defendants in error.

KUNKLE, J.

Heard on error.

This is an action for damages against the defendants as County Commissioners of Franklin County on account of their establishing what is claimed to be an unreasonable grade on Seventh Street in front of the premises of plaintiffs in error, whereby it is claimed the easement of ingress and egress to their premises was impaired to their damage in the sum of \$600.

The answer of defendants after admitting the official capacity of the Board of County Commissioners denies the other allegations of the petition. The answer, therefore, denies that the Board of County Commissioners of Franklin County by proper and legal proceedings made the change of grade complained of.

At the conclusion of the testimony defendants in error moved the court to direct a verdict in their favor upon the ground that the acts complained of were *ultra vires* and void and that Franklin County could not, therefore, be held responsible.

This motion was sustained by the trial court and the jury returned a verdict in favor of defendants in error.

Motion for a new trial was overruled and judgment was entered upon the verdict.

In brief it appears from the record that in October, 1916, the Board of County Commissioners of Franklin County without any previous proceedings having been had therefor let a contract for grading and macadamizing the road in front of the premises of plaintiffs in error.

This improvement involved a cut of between three and four feet below the former surface of the road in front of the premises of plaintiffs in error.

The County Commissioners afterwards by resolution adopted this road as part of the plan to eliminate grade crossings over portions of the Hocking Valley Railway Company.

It seems apparent that the new road was constructed for the purpose of permitting traffic to pass between High Street and the Smoky Row Road and formed a link in the elimination of grade crossings.

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Counsel for defendants in error claim that as no previous proceedings or formal order of the Board of County Commissioners were had, that the contract for the improvement of the said road in front of the premises of plaintiffs in error and the construction of such road, became the individual act of the defendants who composed the Board of County Commissioners at that time and that defendants in error were not acting in their official capacity as public officers; that before Franklin County can be held liable it must affirmatively appear that regular proceedings for the establishment of such grade were had and that a formal order was entered by the Board of County Commissioners authorizing the improvement in question.

It is admitted that the record of the County Commissioners does not show that any formal action was taken by the Board of County Commissioners prior to the letting of the contract aforesaid.

Counsel upon both sides have favored the court with very exhaustive briefs citing and reviewing many authorities.

We have considered the authorities so cited but shall not attempt to review them in detail.

We think the authorities in this state sustain the view that no formal action or proceeding is required by the Board of County Commissioners prior to their improvement of a road in order to create a liability against the county for the making of an unreasonable grade in front of the premises of an abutting property owner.

The County Commissioners are charged by law with the maintenance and improvement of highways and although they may have proceeded irregularly in the first instance yet it appears that subsequently the improvement in question was formally recognized and adopted by the County Commissioners by the passage of Section 3 of the resolution designated as Exhibit No. 7.

Under the circumstances of this case we are of opinion that the acts of the Board of County Commissioners in the respects complained of were official, rather than individual acts and that

the grade of the road in front of the premises of plaintiffs in error as between the owners of property abutting thereon and the County Commissioners, was legally established.

It must be remembered that this is not a case between the contractor upon the one hand and the public upon the other hand in which the validity of a contract is involved.

The following, among other Ohio authorities, might be cited upon the above proposition namely: 14 C.C. (N.S.), page 198; affirmed by Supreme Court in 84 O. S. Reports, 503; 50 O. S. Reports, page 628.

Counsel in their briefs and also in the oral argument have more or less frequently referred to a change of grade in front of the premises of plaintiff in error. We are of opinion that the petition in this case proceeds upon the theory that an unreasonable grade was established rather than that there was a change of grade.

There is some evidence in the record tending to show that the grade established by the Board of County Commissioners was unreasonable. There is also evidence tending to show that the grade so established is not an unreasonable grade under all the circumstances disclosed by the record. This is a question for the jury rather than for the court.

We think the trial court was in error in holding as a matter of law that there could be no liability against the County for the action of the County Commissioners in cutting down the road in front of the premises of plaintiffs in error. The case should in our opinion also be submitted to the jury upon the question as to whether the grade so established is or is not an unreasonable grade. The judgment of the lower court will be reversed and cause remanded.

ALLREAD and FERNEDING, J. J. concur.

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**RIGHTS INVOLVED IN IMPROVEMENT OF A STREET IN MUNICIPALLY ACQUIRED TERRITORY.**

Court of Appeals for Montgomery County.

**THE CITY OF DAYTON v. ELIZABETH T. HAINES.\***

Decided, July 25, 1919.

*Street Improvement—Property Owner Must be Notified of Contemplated Change of Grade—Municipally Annexed Territory Subject to Established Grades—Rights of Abutting Property Owner in Shade Trees and Excavated Dirt and Gravel.*

1. Notice of the improvement of a street involving a material change of grade, in order to bar an action by a property owner for damages therefor, should definitely state that a change of grade is contemplated as a part of such improvement.
2. When the limits of a municipality are extended the municipality acquires the territory subject to the established grades of all highways within the territory so annexed.
3. Where shade trees have been planted and maintained on the unused portion of a country road after a grade has been established upon such country road by improvement and user, damages to the abutting property by reason of the injury to or destruction of said shade trees, caused exclusively by a change of grade, may be recovered by the property owner.
4. Dirt and gravel excavated by a municipality in making a street improvement may be appropriated by such municipality so far as the same is necessary to be used in making such improvement. The property owner upon demand is entitled to the surplus dirt and gravel so excavated, to be delivered at the option of the city, either at some convenient place on the street or at some convenient place on the abutting property adjacent to the street.
5. A demand made by the property owner upon the contractor for such surplus dirt and gravel is sufficient where the city has by its contract committed that feature of the work to the contractor.

*W. S. McConnaughey, John C. Shea and John B. Harshman,*  
for plaintiff in error.

*McMahon & McMahon and Robert K. Landis,* for defendant  
in error.

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\*Writ of certiorari refused by the Supreme Court.

KUNKLE, J.

Heard on error.

This is an action in which defendant in error sought to recover damages on account of a change of grade in the street in front of her premises.

In the lower court defendant in error recovered a verdict in the sum of \$1670. Motion for a new trial was overruled and judgment was entered upon the verdict. From such judgment plaintiff in error prosecutes error to this court.

In brief, defendant in error, in her petition claims that prior to 1909, the portion of Main Street, upon which her lands abut, was outside the limits of the city of Dayton and for a period of more than forty years such highway had been maintained and improved at a definite fixed grade by the proper authorities; that she, relying upon the apparent permanence of such grade, improved her real estate to conform to said grade by erecting a dwelling house and stable, planting shade trees and fruit trees, constructing fences and laying out a driveway from said pike into and upon her premises; that in 1909 the city by appropriate action extended the city limits so as to include her land and the portion of Main Street upon which it abutted; that in 1910 the council of said city fixed the grade of the portion of Main Street upon which her land abuts, lower than the grade of the highway as it was then constructed and used; that in 1911 the council of said city adopted an improvement resolution declaring it necessary to improve North Main Street from Norman Avenue to the north corporation line by setting stone or cement street curb, or combined curb and gutter of cement, and paving the roadway according to the grade established by council; that a notice of the passage of this resolution was served on her and which notice was in the following form:

“Dayton, Ohio, March 14, 1911.

“To Elizabeth Haines:

“You are hereby given notice of the passage of the City Council of the City of Dayton, State of Ohio, on 27th day of February, 1911, of Improvement Resolution No. 861, which was duly approved by the Mayor of said city, declaring it necessary to

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improve North Main Street from Norman Avenue to the North Corporation line, by setting stone or cement straight curbing or combined curb and gutter of cement, and paving the roadway either Brick, Sheet Asphalt, Bituminous Macadam (or certain other materials) in accordance with plans, specifications, estimates, and profiles on file in the office of the Dept. of Public Service.

"The expense of said improvement will be assessed by the foot frontage of the property bounding and abutting upon said improvement.

"By order of the Council.

"Wayne G. Lee, Clerk of Council.

"Harry Schmitz, Ass't. Clerk."

Defendant in error says she had no other notice nor any knowledge that a change of grade was contemplated until the work was commenced on the street in the autumn of 1912 in accordance with an ordinance to proceed passed by council April 21, 1911; that carrying out the provisions of the improvement resolution and ordinance the city has cut down the grade of Main Street in front of her property so that the surface of the street is from three to seven feet below the surface of plaintiff's land; that seven of plaintiff's live shade trees were undermined, cut and damaged so that same have died and all will be destroyed; that her driveway was destroyed, her fences torn down, her dirt and gravel to the amount of 3250 cubic yards were hauled away against her protest and the means of ingress and egress to her property destroyed; that on April 11, 1916, she filed a claim for damages with the Clerk of the Commission of the city, which has never been allowed, adjusted or paid in whole or in part.

A demurrer was filed to this petition and was overruled by the lower court.

The answer of the city in brief admits the allegations as to the legislation by the city council and that the improvement was made as provided thereby; avers that plans and specifications for said improvement were on file in the office of the Director of Public Service December 10, 1910 and were open to inspection, and employes of the city were at all times ready and will-

ing to explain the same; that defendant in error did not file any claim for damages within two weeks after the notice recited in the petition was served upon her; that she thereby waived her right to claim damages and denies that she has been damaged and denies all other allegations.

At the conclusion of the testimony of defendant in error the city asked for a directed verdict, claiming,

(1) That the failure of defendant in error to file a claim within two weeks after service of notice, barred any claim.

(2) That there was no evidence that the land of defendant in error was any less valuable by reason of the change of the grade.

(3) That the evidence as to the disposal of the dirt in the street and the value of the trees and the cost of sloping and sodding and changing the driveway did not establish her claim to any damages.

This motion was overruled and the city, among other things, introduced testimony tending to show that the value of the property of defendant in error for platting purposes was increased by reason of the change of grade; that the shade trees were within the line of the street; that the contractor offered to slope the banks along the property of defendant in error but she refused to allow him to do so, etc.

Various errors are relied upon by the city to secure a reversal of this judgment.

We have carefully considered the authorities cited in the very exhaustive briefs which have been furnished by counsel. We shall, however, not attempt to discuss or distinguish these authorities in detail but will merely announce the general conclusions at which we have arrived.

The first question presented for consideration, and the one which goes to the foundation of the action, relates to the notice which was served upon defendant in error and other property owners of the proposed improvement.

Sections 3814, 3815 and 3816 G. C. relate to the passage of a resolution declaring the necessity for the improvement, the filing of plans, specifications, estimates, profiles, etc.

Section 3818 G. C. provides that a notice of the passage of such a resolution shall be served by the Clerk of Council, or an Assistant, upon the owner of each piece of property to be assessed, in the manner provided by law for the service of summons in civil actions.

Section 3823 G. C. provides that the owner of a lot, or of land bounding or abutting upon the proposed improvement, claiming that he will sustain damages by reason of the improvement, within two weeks after the service of the notice or completion of the publication thereof, shall file a claim in writing with the Clerk of Council, setting forth the amount of the damages claimed, etc.

Section 3911 G. C. reads as follows:

"Proceedings in respect to improvements shall be liberally construed by the councils and courts to secure a speedy completion of the work, at a reasonable cost, and the speedy collection of the assessment after the time has elapsed for its payment, and merely formal objections shall be disregarded, but the proceedings shall be strictly construed in favor of the owner of the property assessed or injured as to the limitations on assessment of private property, and compensation for damages."

From a careful consideration of the Sections of the Code referred to, the authorities cited by counsel, and the notice which was actually served upon defendant in error of the improvement in question, we are of opinion that the notice was insufficient to bind defendant in error for the reason that such notice purports to define the nature of the improvement which the city intends to make in the street in front of the premises of defendant in error and entirely omits to advise defendant in error of the very important fact that a change of grade is contemplated or that the grade of the proposed improvement involves a material cut in front of her premises. This was an important feature insofar as defendant in error was concerned. To her it was probably the most important feature connected with the improvement of the street, yet the notice as served contained no suggestion that a change of grade was contemplated. It is true reference was made in the notice to the plans and specifications

which were on file in the office of the city engineer, but in our opinion when a notice purports to define the nature of the improvement the failure to enumerate an important feature of the improvement would tend to mislead and would therefore be insufficient.

We think the failure to file a claim for damages within the specified time is in the nature of a forfeiture and the notice must be strictly construed and that the law requires a notice sufficiently definite to advise the owner of the property of what the city proposes to do; that in the absence of such notice the property owner would not be estopped from asserting a claim for damages.

Upon the trial of the case the court, upon its own motion, submitted two special findings relating to certain features of damage, so as to enable the court upon a motion for a new trial to eliminate one or both of such elements of damage in case he, upon further consideration, became convinced that the same were not proper. There was some controversy between counsel at the time and the court instructed the jury as to the part these findings should play in the general verdict for damages. Counsel for the city excepted to giving these special findings to the jury, and now complain that they were improper and had a tendency to mislead the jury in fixing the amount of the general verdict.

The verdict including the special findings is as follows:

"We do assess plaintiffs damages by reason of the premises in the sum of (\$1670.00) Sixteen Hundred-Seventy and 00-100 Dollars. As in part making up said damages we find that plaintiff's premises have been depreciated in value *First*: by reason of the loss of dirt and gravel in the sum of (\$720.00) Seven Hundred Twenty and 00-100 Dollars. *Second*: by reason of injury to shade trees in the sum of (\$300.00) Three Hundred and 00-100 Dollars."

Counsel for the city earnestly contend that the item of injury to the shade trees should not have been allowed and should now be eliminated from the verdict and judgment. This question is

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not free from doubt. There was evidence, however, tending to prove that the owner of the property planted said shade trees on or near the property line after the former alleged grade was established by improvement and user. The evidence tends to prove that all the shade trees were within the legal limits of the highway. It also appears that at the time the alleged former grade was established the road was a country road but that the city limits were subsequently extended so as to include the same.

The rights of an owner of abutting property who plants shade trees in the unused portion of a highway are not clearly defined, but we think the authorities establish the fact that such owner has certain rights in shade trees properly located on the unused portions of a highway and that where by reason of a change of grade such trees are injured or destroyed, damages therefor may be recovered in an action by the property owner.

If no change of grade had been made and the injury to or removal of the shade trees had been required by the city for the purpose of improving the street, at the former established grade, then the question would be entirely different. We are at present considering a case where there is evidence tending to show that the trees were planted according to an established grade and were injured by an improvement based upon a change of grade. We are of opinion that the injury to the shade trees was properly considered as an element of damage.

We have also had difficulty with the item as to dirt and gravel. We are clearly of opinion that the city had a legal right to excavate, remove and appropriate so much of the dirt and gravel from in front of plaintiff's premises as was necessary to make the fills on the improvement in question. The evidence tends to prove that 1044 cubic yards of the dirt and gravel in controversy were used for this purpose. The trial court erroneously stated in his charge that 850 cubic yards were required for the fill in the street, but this statement of the court can be cured by a remittitur.

The difficulty arises over the demand of the property owner to have all of the dirt and gravel which was removed from in

front of her property, hauled and deposited in a low place in the rear of her five acre tract. We think the defendant in error had an interest in the dirt and gravel removed from the street in front of her property and not required in the improvement in question. We think her rights were subordinate to those of the city in making the improvement. The question is not without difficulty as to how her right, to the excess dirt and gravel, should be worked out. We have reached the conclusion that the most reasonable rule would be that the property owner, by proper demand, may obtain the excess dirt and gravel, when excavated by the city, the same to be delivered at the option of the city either at some convenient place on the street or some convenient place on the abutting property adjacent to the street. We do not think the city could be required to haul and deliver the dirt at some remote place on the plaintiff's property.

We also think the demand which defendant in error made upon the contractor, under the circumstances of this case, was sufficient. It is true she demanded more dirt than she was entitled to, but the demand called the contractor's attention to her claim and he was not justified in entirely ignoring the same but should have offered to deliver the dirt, after being excavated, either on the street or at some convenient and proper place adjacent to the street.

Complaint is made that the demand of the property owner should have been made on the city or some authorized agent of the city but we think the city by its contract committed that feature of the work to the contractor and that the demand on the contractor was sufficient to bind the city. The evidence was not very satisfactory as to the value of the dirt delivered on the street or adjacent thereto, and it appears that the jury must have adopted the estimate made by certain witnesses as to the value of such dirt delivered at the point which the plaintiff selected. We think the verdict is excessive and while the evidence is not clear as to the exact amount of plaintiff's damage, we have considered all the evidence in the record and have also applied to a certain extent, the rules of general information, and have reached the conclusion that the item as to the removal of dirt

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and gravel should be reduced from \$720 to \$360. The reduction of this item to \$360 also includes the amount to be remitted on account of the error of the trial court in reference to the amount of dirt and gravel required to make the fills in the street.

Counsel for the city contend, as above stated, that the jury was misled by the court submitting the special findings above referred to. We are of opinion that the trial court had the right, especially with the acquiescence of one of the counsel, to submit these special findings for his future guidance after a full consideration of the law applicable to the case. It was a practical way of dealing with doubtful items. The court in his general charge and also in explanation of the special findings, gave the jury the true rule as to the measure of damages, namely: the difference between the value of the property before the new grade was established and the value after such grade was established. We think the special findings are consistent with the rule so given and we do not see how the giving of such special findings under the circumstances could have misled the jury.

We have examined all the questions presented and argued by counsel and are of opinion that there is no prejudicial error except as to the amount of the item for dirt and gravel.

If the plaintiff below will remit \$360 from the amount of the verdict and judgment the same, as modified, will be affirmed. Otherwise, the judgment will be reversed and cause remanded for new trial.

ALLREAD and FERNEDING, JJ., concur.

**SURETY NOT LIABLE FOR PERFORMANCE OF AN  
UNAUTHORIZED CONTRACT.**

Court of Appeals for Franklin County.

COLUMBUS v. CHICAGO BONDING & SURETY Co.

Decided, December 5, 1918.

*Municipal Corporations—Principal and Surety—Contract Void Because in Excess of \$500 and Unauthorized.*

Where the board of purchase of a city governed by a charter is authorized to make expenditures in excess of \$500 only when authority for such expenditures has been granted by council, a contract in excess of \$500 made by such board without authority from council is void, and the surety upon the bond given by the contractor to secure performance of such contract cannot be held liable in the absence of facts amounting to an estoppel.

*H. L. Scarlett and C. A. Leach, for plaintiff in error.*

*James M. Butler and Franklin Rubrecht, for defendant in error.*

**KUNKLE, J.**

Heard on error.

Plaintiff in error seeks to recover from defendant in error, a bonding company, upon a certain bond given by the Kokomo Foundry & Machine Co. to plaintiff in error for the purpose of securing the performance of a contract entered into between the city of Columbus and the Kokomo Foundry & Machine Co. for the installation of certain stokers for the city municipal light plant. The substance of said bond is as follows:

“Know All Men By These Presents, That we, the undersigned, Kokomo Foundry & Machine Company of Kokomo, Indiana, as principal and Chicago Bonding & Surety Company of Chicago, Illinois, as sureties, are hereby held and firmly bound unto the city of Columbus, Ohio, in the penal sum of

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Three Thousand Dollars, for the payment of which well and truly to be made, we hereby jointly and severally bind ourselves, our executors and administrators.

"Signed this 28th day of September, 1916.

"The condition of the above obligation is such that if the said Kokomo Foundry & Machine Company shall well and faithfully do and perform the things agreed by them to be done and performed according to the terms of the foregoing contract, then this obligation shall be void; otherwise the same shall remain in full force and effect."

The petition contains the averments necessary to establish liability, and further alleges that the contractor has performed no part of the work specified in the said contract, and has not furnished, delivered, or erected two 500 horsepower underfeed stokers at the municipal light plant in said city of Columbus, nor performed any work in connection therewith, and that upon the failure of said contractor to fulfill its contract plaintiff in error was obliged to purchase the said material elsewhere and at a price \$4,020 greater than the contract price with the Kokomo Foundry & Machine Co.

It is conceded that neither the contractor, nor the receiver of said contractor, has furnished any material or performed any labor under the contract, and that no payment has been made by the city to the contractor or receiver upon such contract.

Defendant in error filed an answer containing two defenses.

The second defense, with which we are now concerned, alleges as follows:

"This defendant expressly denies that the Board of Purchase of the city of Columbus, Ohio, was ever at any time authorized or empowered to advertise for bids upon or to enter into any agreement or contract for the purchase of two 500 horsepower Underfeed Stokers for use in extension of the municipal light plant of the city of Columbus or for any other purpose, or that any money was ever appropriated by the said city council to pay the expense of the purchase or installation of the same, or that said Board of Purchase was ever at any time authorized or empowered to enter into any contract or agreement with the said Kokomo Foundry & Machine Co., or with any

other persons for the purchase of two 500 horsepower Underfeed Stokers for use by said city of Columbus, as aforesaid.

"But on the contrary this defendant expressly avers that said alleged contract or agreement purporting to have been made with the said Kokomo Foundry & Machine Co., for and on behalf of the city of Columbus, Ohio, was made by the said Board of Purchase wholly without authority of any kind whatsoever from the city of Columbus or from the city council of said city without any appropriation ever having been made therefor; that said alleged contract between the said Board of Purchase of said city of Columbus and the said Kokomo Foundry & Machine Co. was and is not the contract of the city of Columbus, Ohio; and that, having been made by the said Board of Purchase without any authority of any kind whatsoever and without any appropriation therefor, as aforesaid, said alleged contract was and is of no binding force or effect and was and is wholly illegal and void.

"This defendant says that at the time it executed said alleged writing styled a bond, dated September 28, 1916, as aforesaid, there was in fact no valid, binding or enforceable contract or agreement between the city of Columbus and the said Kokomo Foundry & Machine Co. for the purchase, construction, delivery or erection of said 500 horsepower Underfeed Stokers or for any other purpose because of the facts and reasons hereinbefore set forth; that said writing styled a bond, dated September 28, 1916, as aforesaid, related only, and was intended to relate only, to the said paper writing between the plaintiff and the said Kokomo Foundry & Machine Co.; that said paper writing, the performance of which it was intended to insure and cover, was and is in fact invalid, illegal, void and of no force or effect, and that therefore the said writing styled a bond, dated September 28, 1916, is itself a nullity, illegal, void, and of no binding force or effect whatever."

The surety company by its answer thus raises the legal question as to whether or not the Board of Purchase of the city of Columbus had the legal authority to make the contract with the Kokomo Foundry & Machine Co.

The city of Columbus demurred to the second defense of the answer upon the ground that the averments of such answer do not constitute a defense.

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This demurrer was overruled in the lower court, and the city not desiring to plead further, final judgment was rendered.

From such judgment plaintiff in error prosecutes error to this court.

The demurrer admits the allegation in the second defense of the answer that the city of Columbus never received any authority from the city council to enter into this contract, and also admits that the city Board of Purchase advertised for bids, awarded the contract, and accepted the bond, without any action having been taken by council, and without any appropriation having been made therefor.

The demurrer also admits that nothing was done by the contractor under the said contract except to furnish the bond in question, and that the city made no payment on account of such contract.

Section 162 of the charter of the city of Columbus provides:

"When any expenditure in any department other than the compensation of persons employed therein, exceeds five hundred dollars, it shall first be authorized and directed by ordinance of the council. When so authorized and directed, the proper board or officer shall make a written contract in strict accordance with the terms and conditions of the ordinance, with the lowest and best bidder."

Section 162 of the Columbus charter is similar to Sec. 4328, G. C.

Section 142 of the Columbus charter creates a Board of Purchase, and provides that such board shall make all purchases for the city in the manner provided by ordinance.

It is claimed by counsel for defendant in error that there can not be a valid contract of suretyship without a valid principal contract, and that in the case at bar the principal contract between the city of Columbus and the Kokomo Foundry & Machine Co. is void because it involves an expenditure in excess of five hundred dollars and the Board of Purchase entered into it without being authorized so to do by an ordinance of the council; that as the principal contract between the city and the

contractor is void, the surety company can not be held liable upon its bond of indemnity.

Counsel have favored the court with very helpful briefs wherein many of the leading cases in this and other states are discussed. We shall not attempt to analyze or discuss these cases in detail.

Some of the decisions from sister states can easily be distinguished by reason of differences in the statutes of such states.

Our supreme court in an unbroken line of decisions, such as *Lancaster v. Miller*, 58 Ohio St., 558 (51 N. E., 52); *Buchanan Bridge Co. v. Campbell*, 60 Ohio St., 406 (54 N. E., 372); *Comstock v. Nelsonville*, 61 Ohio St., 288 (56 N. E., 15); *Wellston v. Morgan*, 65 Ohio St., 219 (62 N. E., 127); *State v. Fronzer*, 77 Ohio St., 7 (82 N. E., 518), and various other decisions, has announced the rule that so-called "restrictive statutes," which control and safeguard municipalities must be complied with, and that the failure so to do renders the contract void, and that the court will leave the parties where it finds them.

We had occasion to discuss one of these restrictive statutes in the case of *Mad River Township v. Austin-Western Road Machinery Co.*, 5 Ohio App., 298; 27 C. C. (N. S.), 209, in which the supreme court afterwards refused to order a writ of *certiorari*.

It is earnestly argued by counsel for plaintiff in error that Sec. 162 of the Columbus charter does not expressly provide that a contract made in violation of the restrictive provisions of said section shall be void.

It is true that many of the restrictive sections of the General Code do provide that a contract made in violation of such restrictive provisions shall be void.

Where there is a statute conferring general powers upon a board, followed by a restrictive statute, it is possibly the rule that the restrictive statute would have to contain an express provision to that effect before the contract would be void. Where no general powers are conferred upon a board and the only

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authority of the board is conferred by the restrictive statute, we are of opinion that if the terms of the restrictive statute, as to authority, are not complied with, any contract of the board made in violation of such restrictive provisions would be void and of no effect.

It will be noted that Sec. 142 of the Columbus charter does not confer general power to contract upon the Board of Purchase. Such section, in effect, makes the authority of said board to purchase depend upon the enactment of an ordinance.

Under Secs. 142 and 162 of the charter the enactment of an ordinance conferring authority upon the Board of Purchase for the purpose of enabling such board to make a valid contract is jurisdictional, and in the absence of such an ordinance we think the board would be acting without any authority.

The failure of the council to pass an ordinance authorizing the Board of Purchase to make a contract is not a mere irregularity, but goes to the question of the jurisdiction of the board to act.

The contract between the city and the contractor being void, and not merely voidable, there was no valid contract upon which to base a liability of suretyship.

Many cases are cited in which the surety was held although the principal was not bound.

We think the principle underlying this line of cases does not apply to a case wherein the principal contract is absolutely void.

It is also suggested that the surety company is estopped from denying the recital in the bond with reference to the principal contract.

We think the recital in the bond is not of itself conclusive upon the surety that the contract referred to was a valid contract.

In addition to the recital in the bond, before the surety will be estopped, there must also be some circumstance which would make it inequitable for the surety to deny the recital in the bond and show the truth.

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No such circumstance appears in the record. As a matter of fact the defect in the contract consists in the failure of the city to enact the necessary ordinance to make the contract valid.

Under such circumstances we are of opinion that the surety company is not estopped from showing the true situation with reference to the principal contract.

We have considered all the grounds for reversal suggested by counsel for plaintiff in error in their brief, and are of opinion that the judgment of the lower court should be affirmed.

Judgment affirmed.

ALLREAD and FERNEDING, JJ., concur.

**FOR RECOVERY OF EXCESSIVE RATES CHARGED FOR  
SHIPMENTS OF COAL.**

Court of Appeals for Lucas County.

BIG 4 COAL CO. v. HOCKING VALLEY RY.

Decided, February 3, 1919.

*Railways—Action to Vacate Order of Utilities Commission—Results Only in Suspending Order Pending Litigation—Remedy of Shipper for Excessive Charges Not Limited to Action on the Bond.*

1. Sections 614-69 and 614-70 G. C., as amended 102 O. L., 571, were enacted for the protection of shippers and to prevent illegal exactions of freight rates and other charges, and the giving of the undertaking provided for in the latter section does not vacate or nullify the order of the Public Utilities Commission, but merely suspends the enforcement of the same during the pendency of the litigation.
2. The remedy of a shipper who has been required to pay illegal freight rates is not limited to an action on the bond given under 102 O. L., 571, but the shipper may recover in an action for that purpose all amounts paid in excess of the amounts authorized to be collected, and is not limited in such action to the penalty named in the bond.

*Silas T. Hurin and Thad S. Powell, for plaintiff in error.  
Wilson & Rector and Brown, Geddes, Schmettau & Williams, for defendant in error.*

**RICHARDS, J.**

Heard on error.

The original action out of which this proceeding in error grows was brought in the court of common pleas by the Big 4 Coal Co. to recover claimed excessive and unlawful rates and overpayments exacted of it in the shipment of coal from Nelsonville, Ohio, to Toledo, on the defendant's line of railroad. The petition was met by a general demurrer, which the court, on

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\*Motion to require the Court of Appeals to certify its record in this case overruled by the Supreme Court, March 25, 1919.

consideration, sustained, and the plaintiff not desiring to plead further final judgment was rendered, dismissing the petition.

It appears from the allegations of the petition that the plaintiff is engaged in the business of buying and selling coal in Toledo, and that on June 27, 1911, the Railroad Commission of Ohio by an order effective July 27, 1911, reduced the freight upon coal shipped in carload lots from Nelsonville to Toledo, on defendant's line, from \$1.00 per ton to \$.85 per ton, and fixed and established \$.85 per ton as a legal and reasonable rate on shipments between said points. It is further alleged that the defendant railroad company thereafter commenced proceedings in the Court of Common Pleas of Franklin county, against the Public Service Commission, the successor of the railroad commission, for the purpose of securing the vacation and suspension of said order so made by the commission, and that the court in which the action was pending stayed the order of the commission, upon the execution of a bond, but that on the final hearing of the case the court approved the order of the commission and dissolved the injunction. The case was carried, by proper proceedings, to the court of appeals, where a like decree was rendered, and thereupon the case was carried to the supreme court of Ohio where the judgment of the court of appeals was affirmed.

The petition avers that during all the time that the order was stayed by said courts the defendant company continued to charge, and the plaintiff was required to pay, and did pay, \$1.00 per ton freight on all coal shipped to plaintiff over the defendant's line. The petition avers that the decision of the Supreme Court, finally approving the finding and order of the commission fixing the rate at \$.85 per ton, was rendered on July 2, 1915, and that the defendant company on the 27th day of that month filed its tariff effective July 28, 1915, making said rate from Nelsonville to Toledo \$.85 per ton. It is averred that between July 27, 1911, and July 28, 1915, the plaintiff received at Toledo, 1,180 carloads of commercial coal, shipped over the defendant's line from Nelsonville, containing 49,908.7 tons, for all of which the plaintiff was illegally charged and required to

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pay, and did pay, at the rate of \$1.00 per ton as freight, whereas the defendant company was entitled to charge and receive for such shipments \$.85 per ton and no more.

It is insisted that the demurrer was properly sustained and the petition dismissed because the commencement of the action by The Hocking Valley Railway Company in the court of common pleas of Franklin county, to vacate and set aside the order of the Railroad Commission, did, in fact and in law, vacate the order of said commission, and that therefore the only lawful, existing rate during the time embraced in the petition was \$1.00 per ton; and that, in any event, the plaintiff could only recover by an action upon the bond which was given in the common pleas court of Franklin county and that if such recovery could be had in that manner the maximum amount of the recovery would be the penalty named in the bond.

The court of common pleas adopted the view that the order of the railroad commission, establishing the \$.85 rate, was vacated in the court of common pleas of Franklin county, and that the rate of \$1.00 per ton was therefore the only legal rate, and for this reason sustained the demurrer and dismissed the petition.

A solution of the question depends upon a construction of Sec. 614-69, G. C., and Sec. 614-70, G. C., as amended in 102 O. L., 571. The action authorized by these sections is one to vacate and set aside an order of the commission. That is the ultimate relief sought by the plaintiff in such action, and the latter section cited authorizes the court to suspend the operation of the order, pending the litigation. One clause in the latter section provides that the commencement of such action to vacate and set aside the order "shall vacate and suspend the order of the commission" upon the giving of an undertaking in an amount to be determined by the court. The word "vacate" was not well chosen to express the evident legislative intent of the statute and as used in this section it can only be construed to mean the same as the word "suspend." A reading of the entire act makes it clearly manifest that the legislative purpose was to suspend the enforcement of the rates

fixed by the commission until the termination of the litigation, and, if the result of the litigation should establish the reasonableness of the rates fixed by the commission, then the amounts collected above the rates so fixed would be excessive. The same section provides that the condition of the undertaking to be given by the plaintiff in that litigation shall be that the railroad company shall refund to each of the users the amount collected by it in excess of the amount which shall finally be determined it is authorized to collect from such users. If the order of the Railroad Commission, fixing the \$.85 rate, were to be vacated by the commencement of the action, there would be little use for the execution of an undertaking, the condition of which was as above stated. We construe this statute as one which merely suspends temporarily, and during the pendency of the action, the enforcement of the order of the Railroad Commission. If, as a final result of the litigation, the rates as fixed by the commission are sustained by the court, then those rates have been, during the litigation, the only lawful rates, but their enforcement prevented by order of court during the pendency of the action. In such event it would follow that an exaction above the \$.85 rate per ton, fixed by the commission, would be unlawful, and as said in the *Taylor-Williams Coal Co. v. Public Utilities Commission*, 97 Ohio St., 224.

"The remedy of the shipper is by action in a court of competent jurisdiction against the company on its liability to refund the excess charged above the amount finally determined that it was authorized to collect."

The case just cited involved a construction of the identical order made in the case now under consideration, and in that case the court, speaking through Johnson, J., refers frequently to the order of the commission as being "suspended" during the pendency of the litigation, and nowhere is it referred to therein as "vacated." It was held in that case that the charge made during the pendency of the litigation was not a proper subject for a complaint to the Public Utilities Commission for overcharge, but that the railroad company incurred a liability

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to refund and the remedy would be by an action at law to recover the amount.

This action is not brought on the bond given in the court of common pleas of Franklin county, but is one to recover the amounts claimed to have been unlawfully exacted. Counsel for defendant urge that no action will lie except one upon the bond given in that litigation. It is said, in argument, that the bond there given was for \$25,000, and that the excessive amounts collected from various shippers, during that litigation, amount to \$300,000. We are not persuaded that the only remedy allowed is an action upon the bond. The bond is given as a protection to the shipper and not as a limitation upon his right to recover. Long before the establishment of a railroad commission a remedy existed for overcharges made by common carriers, and it appears to this court that the remedy by action on the bond is only an additional or cumulative remedy. By staying the enforcement of the lawful rate fixed by the railroad commission, the plaintiff in that action incurred a liability to refund the amount collected by it in excess of the amount which it was authorized to collect. The bond which was there given was a mere incident of the liability to refund, a mere security for the repayment in so far as it might secure the same. In its final analysis the situation is not materially different from a case where a landlord and tenant are in controversy over the amount of monthly rental to be paid by the terms of their agreement, the landlord contending it is \$100 per month and the tenant that it is \$85 per month. Litigation arises to determine the rate agreed on, and while that litigation is pending the higher rate of \$100 per month is necessarily paid. The litigation finally results in an adjudication that \$85 per month was the lawful rent, but, in the meantime, the higher rate has been paid during the pendency of the litigation. We suppose there can be no doubt but that the tenant would be entitled to recover the excessive rent paid by him and that he may recover the amount so paid independent of any bond that may have been given to secure the same. *New York v. Brown*, 179 N. Y., 303.

Numerous cases have been determined by the courts, growing out of the collection by common carriers of amounts in excess of the rate fixed by various public commissions, and, while the statutes are, of course, not precisely the same, their general tenor is not dissimilar. The case of *Fletcher Paper Co. v. Detroit & M. Ry.*, 198 Mich., 469 (164 N. W., 528), is a very instructive one on the issues in the case at bar. That case, under the title of *Detroit & M. Ry. v. Fletcher Paper Co.* 248 U. S., 30, was affirmed on November 18, 1918, by the Supreme Court of the United States. It appears from that case that the rates fixed by the commission were to become effective twenty days after service on the railroad company, while the Ohio statute, Sec. 535, G. C., provides that such an order shall, of its own force, take effect and become operative thirty days after service thereof. In the Michigan case, as in the case at bar, the operation of the rates was suspended by litigation, brought to set aside the order of the commission on the ground that those rates were unlawful and unreasonable. The Supreme Court of Michigan allowed a recovery for the sums illegally exacted, putting aside the question whether the statute provided a method of recovering such payments, and asserting that no reason appeared for denying to the plaintiffs the right to recover in an action of assumpsit all of the money illegally taken from them, and that it was immaterial whether they declared upon the statute or upon the common counts.

Other cases, containing analogous statutes and justifying a recovery for excessive charges, are the following: *State v. Chicago & Alton Ry.*, 265 Mo., 646 (178 S. W., 129; 1916C L. R. A., 309); *White v. Delano*, 270 Mo., 16, and *Love v. North American Co.*, 229 Fed., 103.

We are forced, on a consideration of the statutes and the decisions, to the conclusion that the petition states a good cause of action and that the demurrer thereto should have been overruled.

The statute was passed for the protection of shippers and to prevent their being required to pay unjust charges. It provides for the temporary suspension of the enforcement of the

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rate fixed by the commission, pending the litigation, and does not justify holding that the mere commencement of an action vacates and nullifies the schedule of rates fixed by the commission. If the rates, as established by the commission, are litigated, and ultimately sustained, and during the pendency of the litigation the railroad company collects a higher rate than that established by the commission, such company is liable to refund the excess collected above the rate established by the commission. To adopt any other construction would enable the shipper to say, and say justly, of the law and the courts, that they "keep the word of promise to our ear and break it to our hope."

Judgment will be reversed and the cause remanded with directions to overrule the demurrer to the petition and for further proceedings.

Judgment reversed, and cause remanded.

CHITTENDEN and KINKADE, JJ., concur.

**VALIDITY OF ORDINANCE RELATING TO STREET  
OBSTRUCTIONS.**

Court of Appeals for Greene County.

THE CITY OF XENIA v. H. E. SCHMIDT.\*

Decided, November 26, 1919.

*Municipal Corporations—Ordinance Relating to Obstructions in Streets Discriminatory, When.*

An ordinance of a city which makes it unlawful to deposit certain temporary obstructions such as boxes, barrels, merchandise, etc., upon any street or sidewalk of said city but which excepts from its operation certain permanent obstructions such as steps, bay windows, columns, etc., is discriminatory and illegal.

*J. A. Finney and M. J. Hartley*, for plaintiff in error.

*M. A. Broadstone, McGrew & Laybourne, Marcus Shoup and F. L. Johnson*, for defendant in error.

KUNKLE, J.

Heard on error.

Defendant in error was charged, tried and convicted of violating an ordinance of the city of Xenia, Ohio, by placing certain temporary obstructions on the sidewalk in front of his place of business. The ordinance in question makes it unlawful to deposit upon any street, alley, sidewalk, etc., "any wood, coal, box, barrel, crate, cask, keg, casting, lumber, goods, wares, furniture merchandise or any other material or obstruction whatsoever unless for such reasonable time as may be actually necessary for receiving or discharging the same from store building or other place, etc."

The Court of Common Pleas reversed the judgment of the lower court upon the ground that the ordinance in question was not of uniform operation but excepted from its provisions cer-

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\*Motion to require the Court of Appeals of Greene County to certify its record in this case overruled by the Supreme Court, March 2, 1920.

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tain permanent obstructions such as permanent steps or approaches to buildings already abutting on any street and any balcony, bay window or column of any building already abutting on any street.

This is an interesting and important case and we have carefully considered the authorities cited but will not attempt to review the same in detail. We will merely announce the conclusion at which we have arrived after an examination of such authorities.

From such examination we are clearly of opinion that an ordinance of a city cannot be upheld which is not of uniform operation or which discriminates between persons in substantially the same circumstances.

The exemptions from the provisions of the ordinance in question consist of permanent obstructions, while the ordinance attempts by its provisions to make it unlawful to deposit temporary obstructions.

We are unable to see any good reason for prohibiting temporary obstructions and at the same time legalizing many obstructions of a permanent nature.

Counsel for plaintiff in error insist that the exceptions contained in the ordinance were intended to cover the permanent obstructions which had existed for such a length of time as to have acquired a lawful right in the sidewalks. It must be observed, however, that by the terms of the exceptions in the ordinance, no limitation is placed upon such permanent obstructions as have existed for twenty-one years or more. The exemptions from the provisions of the ordinance include permanent obstructions of the classes mentioned without any reference to the length of time such obstructions may have existed upon the sidewalks in the streets of Xenia.

We are in thorough accord with the sentiment expressed by the city solicitor that a city can be beautified to a great extent by clearing its sidewalks of obstructions and are prepared to assist the solicitor in this respect to the extent which we may be authorized by law, but as above stated, from an examination of the authorities we are of opinion that the same must be accom-

plished by ordinances which are of uniform operation and which contain no unreasonable discriminations.

The written decision of Judge Clevenger of the Court of Common Pleas has been submitted to us. We have read the same and in the main are in harmony with the reasoning contained therein insofar as the same applies to the case at bar.

Finding no error in the record which we consider prejudicial to plaintiff in error, the judgment of the lower court will be affirmed.

ALLREAD and FERNDING, JJ. concur.

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**CORPORATE CONTRACTS IN WHICH DIRECTORS HAVE  
A PERSONAL INTEREST.**

Court of Appeals for Summit County.

**KIRN ET AL V. KRAUS PLUMBING & HEATING CO. ET AL.\***

Decided, October 6, 1919.

*Corporations—Validity of Contracts Executed by Directors having a Personal Interest Therein—Increase by Directors of their Own Salaries as Officers.*

1. In the absence of statutory provisions prohibiting the directors of a corporation from voting upon or executing contracts in which they are personally interested, such contracts are not void unless they constitute a breach of the faith reposed in the directors by the stockholders.
2. Where the by-laws of a corporation confer authority upon the directors to fix the salaries of the officers of such corporation, the action of the directors in voting to increase their own salaries as officers is not void, in the absence of a showing of fraud or unfair dealing toward the stockholders of the corporation.

*W. E. Pardee and F. E. Whittemore, for plaintiffs.  
Mather & Nesbitt, for defendants.*

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\*Motion to require the Court of Appeals to certify its record in this case overruled by the Supreme Court, December 22, 1919.

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**VICKERY, J.****Heard on appeal.**

This action comes into this court on appeal from the court of common pleas of Summit county, and was heard below and here practically upon an agreed statement of facts, although an examination of the pleadings will disclose that all the facts admitted in the agreed statement of facts, or proved by the evidence, were set forth in the petition and admitted in the answer, so the question resolves itself practically into a question of law.

The action was brought by Walter F. Kirn and John H. Shuman, as plaintiffs, against The Kraus Plumbing & Heating Company, Elmer D. Ruch, John V. Kraus and Fred W. Koch, to enjoin the corporation, The Kraus Plumbing & Heating Company, from paying, and the other defendants from receiving, certain amounts of money which had been voted to them as officers and employees of the said Kraus Plumbing & Heating Co.

It seems that the Kraus Plumbing & Heating Company is a corporation incorporated under the laws of the state of Ohio, with a capital stock of 250 shares, the par value of which is not disclosed in the record, but being presumably \$100 per share, of which stock the plaintiffs own 90 shares, the rest being owned by the defendants, the principal stockholder being John V. Kraus, who holds something like 140 shares, the rest being divided among the other three defendants.

It appears from the record that the two plaintiffs, together with the three defendants, constituted the board of directors of the Kraus company, and that on or about the 7th day of April, 1917, at a regular meeting of the board of directors of the Kraus company, the defendants were elected, respectively, Ruch, as president; Koch, as vice president, and John V. Kraus, as general manager, and their salaries fixed as follows:

President Ruch, \$70 per week.

Vice president Koch, \$70 per week.

General Manager John V. Kraus, \$200 per week.

It also appears from the record, and is admitted in the pleadings, that the resolution providing for the salaries of the three officers herein referred to, together with salaries for other employees, was contained in a blanket resolution, that the resolution was introduced by one of the three defendants, that the resolution was carried by the votes of the three defendants, and that the two plaintiffs voted against said resolution; and upon the fact that the three defendants, who were interested parties, voted for their own salaries is based the contention of the plaintiffs, upon which they ask for an injunction, claiming that such contract, so-called, thus made, was absolutely void, and the suit is predicated upon that fact alone, for there is no allegation in the petition that these salaries thus fixed were unfair or unreasonable, nor that the business would not warrant such salaries, but it is simply urged that the parties interested, having no right to vote for their own salaries, the whole transaction is void and would warrant the intervention of a court of equity to prevent the payment of the money.

We have examined the cases cited in the briefs with much care, for apparently this exact question is a new question in Ohio and has never been directly decided. An abundance of authority is quoted outside of Ohio, some of which is based on statute and some not, which would seem to hold that such actions of boards of directors in making contracts in which the members of the board were directly interested were void, but we do not think that to be the rule in Ohio. There is no statute in Ohio against boards of directors, or members of boards of directors, voting upon contracts in which they are personally interested, but it all resolves itself down to the question of good faith, and whether or not the stockholders of the corporation have been treated fairly or unfairly, and, as there is no allegation in the petition that these were unfair contracts, the question is made much easier.

Perhaps if the record would show that the contracts were unfair contracts and that the salaries were not warranted by the financial condition of the corporation, it would be the duty of a court of equity to scrutinize closely the acts of the direct-

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ors in thus contracting with themselves, even though no such allegation was made, but from the facts in this case it appears that this corporation was very prosperous, for at the same meeting, or one closely connected therewith, a dividend of forty per cent. was declared upon the outstanding capital stock, payable at once, and indeed the record shows an amendment to the motion to pay forty per cent. dividend was proposed by one of the plaintiffs to the effect that *one hundred and forty per cent.* dividend be paid, which motion was seconded by the other plaintiff. This would seem to indicate that the corporation was unusually prosperous, for they surely would not have sought to pay a dividend unless it had been earned, and assuming, then, that this corporation had earned a dividend of one hundred and forty per cent., one can not see why a salary for the general manager of two hundred dollars a week would be exorbitant, or why the other officers helping to manage such a successful business should not be entitled to at least seventy dollars a week under conditions as they existed in 1917 and subsequently. Indeed, the record discloses that the two plaintiffs were desirous of distributing a larger share of the corporation assets even than this, for the record shows that one of them moved that it was unnecessary to have so many assets, and sought to have a part distributed, and that the other seconded the motion for such distribution of some of the property and a division of the proceeds amongst the stockholders pro rata in proportion to the amount of stock held by each. We refer to these things to show that the corporation was in such financial condition that good salaries would be warranted, as bearing upon the question of the good faith of the directors in voting salaries to themselves.

In *United States Rolling Stock Co. v. Atlantic & Great Western Ry.*, 34 Ohio St., 450, Judge Boynton, in speaking for the court, after reviewing a great many authorities, comes to this conclusion, and, referring to the citations above, says at page 465:

"These citations sufficiently show that, in England, a contract between a corporation and one of its directors would, in the absence of a statute affecting its validity, be upheld and

enforced in her common-law tribunals. That the same rule prevails in this country is well established."

He cites *Ashurst's Appeal*, 60 Pa. St., 290, and *Stark Bank v. United States Pottery Co.*, 34 Vt., 144.

The by-laws of the corporation under discussion here provide:

"Article 2, Sec. 1. DIRECTORS. The board of directors shall consist of five stockholders to be elected by ballot, to hold office for the term of one year and until their successors are elected and qualified.

"Article 2, Sec. 3. The board of directors shall meet for the election of officers and the transaction of business without unnecessary delay after each annual meeting of the stockholders, and without notice, provided a quorum of the board is present. Three members of the board of directors shall constitute a quorum.

"Article 3, Sec. 1. ELECTION OF OFFICERS. The officers of this company shall be a president, general manager, vice president, secretary and treasurer, and they shall be paid such compensation as the board of directors determine. Such officers shall be elected for one year or until their successors are elected and qualified."

It will be noted that here, by special authority of the stockholders, the directors have been delegated the authority and power to fix the salaries of the officers for the ensuing year. Indeed, the record discloses that all the stock was represented by the directors. Without such delegated authority, undoubtedly, under the law of the state of Ohio, the directors would still have it. Now, it will be noticed that there are but five directors, three of whom are the officers whose salaries were fixed by the directors, and, necessarily, the officers would have to vote upon their associates' salaries, if not their own, and, as this board of directors was then constituted, if a director were prevented from voting upon his own salary he might still vote for his associates' salaries, and there would be a tie vote between the two remaining directors and the two plaintiffs who seem to represent the minority stockholders, which would result in a deadlock if they voted as the record indicates they would

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vote under such circumstances, and thus no salaries could be fixed, which in turn would result in the taking of the corporation out of the hands of those whose money was invested in the corporation and putting it in the hands of strangers. I do not think this is a thing that is desired by our laws, for we have always supposed that the majority of the stock of a corporation controls and manages the corporation and may manage it over the protests of the minority, and the courts will not interfere unless there is clearly a wrong or fraud being perpetrated upon minority stockholders.

In *Yeiser v. United States Board & Paper Co.*, 7 C. C. (N. S.), 15, where the directors had acted unfairly and had committed a fraud on the members of the corporation, the circuit court of the first circuit first quotes from *United States Board & Paper Co. v. Browne*, 1 C. C. (N. S.), 345, to the effect that a contract made by the directors of a corporation with themselves was not void where there was no allegation that it was an unfair contract, and then sets aside the contract in the case under consideration.

We have gone through the authorities cited with much care, and we have come to the conclusion that where there is no allegation of fraud alleged in the pleadings, and no evidence to show fraud or unfair dealings, but the contract under all the circumstances is fair, just and right, such contract will not be set aside, and that an injunction at the suit of some of the directors representing a small proportion of the capital stock of the corporation, who seem to be antagonistic to the management of the corporation, will not be allowed to prevent its being carried out.

It will be noted that all the contracts alluded to in the cases referred to are contracts where members of boards of directors have made contracts with themselves not in the way of salaries but in the way of dealings with the corporation from the outside, and the courts in Ohio have uniformly held that in the absence of bad faith even such contracts are sustainable. It would very much more truly follow that such contracts, if salaries of officers, if fair and reasonable, should be sustained.

We are therefore of the opinion that the plaintiffs are not entitled to the relief prayed for in their petition, and an injunction will be refused and the petition dismissed.

It will be noted that the view we have taken of the right to maintain this action will obviate the necessity of considering the other question involved—that of granting the relief prayed for after the fault complained of has been remedied by the subsequent act of the corporation, to-wit, that of increasing the number of directors voting on their own salaries. The preliminary injunction granted by the court of common pleas in the first instance having on motion been dissolved by that court, no injunction having been since issued, and the money having been drawn by the directors, the view we have taken of the right of the plaintiff to maintain their action obviates the necessity for decision of what for above reasons is claimed to be a moot question.

DUNLAP and WASHBURN, JJ., concur.

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1920.]Montgomery County.

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**BURDEN OF PROVING ILL HEALTH AND FALSE STATEMENTS BY  
ONE APPLYING FOR INSURANCE.**

Court of Appeals for Montgomery County.

**MUTUAL LIFE INSURANCE CO. OF NEW YORK v. LONG.\***

Decided, October 9, 1919.

*Life Insurance—Defense of False Statements Wilfully Made by the Insured—Burden of, Showing on the Company—Right to Open and Close—Verdict Will Not be Set Aside, When.*

Where there are three defenses to an action upon an insurance policy: first, an admission of certain facts, followed by a general denial; second, that assured was not in good health at the time of taking insurance, a condition which avoided the policy; and, third, wilfully false representations in the application for insurance, held:

1. The burden of proof upon all the issues tendered by the pleadings of plaintiff is upon the plaintiff and he has the right to open and close the case.
2. The burden of proving ill-health of the assured at the time the insurance was effected is upon the defendant, and the fact that the insurance company examined the accused and accepted the risk is evidence in favor of plaintiff, and the defendant must produce evidence to overcome the presumption.
3. After finding that certain answers of the assured in his application were false the jury before finding the third defense complete must by virtue of Section 9391, General Code, find that the evidence clearly establishes that the answers were wilfully false.
4. A verdict of a jury should not be set aside upon a mere difference of opinion between the court and jury, especially in a reviewing court, where the case is heard upon a transcript of the evidence.

*Stephens, Lincoln & Stephens and E. H. & W. B. Turner,*  
for plaintiff in error.

*Mattern & Brumbaugh and John Roehm,* for defendant in error.

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\*Motion to require the Court of Appeals to certify its record in this case overruled by the Supreme Court, February 17, 1920.

FERNEDING, J.

Heard on error.

The original action was upon an insurance policy issued by the plaintiff in error upon the life of William E. Long. The policy was made payable upon death of the assured to the defendant in error as beneficiary. The policy was issued on November 27, 1916. The assured died on September 25, 1917. The answer contains three defenses. The first is an admission of certain facts; followed by a general denial. The second asserts a claim that by a condition of the policy it was to become void if the assured at the time of the application and delivery of the policy was not in good health; also, that as a matter of fact the assured was not at said time in good health. The third defense is that the application contained certain representations which were wilfully false.

The trial resulted in a verdict and judgment for the plaintiff in the amount of the policy.

The plaintiff in error insists, first, that the trial court erred in allowing plaintiff below to open and close the case; second, that the court erred in several respects in its charge to the jury; and, third, that the verdict and judgment were against the weight of the evidence on both the second and third defenses.

This case was fully argued and the oral argument was supplemented by elaborate and painstaking briefs analyzing the evidence and authorities bearing upon the issues represented in the review of this case. We have carefully considered the record and the authorities cited.

Upon the right to open and close the case we have reached the conclusion that the burden of proof upon all the issues tendered by the pleadings of plaintiff was upon the plaintiff and not the insurance company.

The plaintiff alleged in the petition that she had complied with all the conditions of the policy. This averment was not admitted. It therefore fell within the general denial of the answer. Accordingly, it was incumbent upon the plaintiff to offer some evidence upon this averment. The plaintiff offered the application for the policy, and the policy itself, and then

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rested. While this averment of the petition was not the foundation of the real controversy, nevertheless, from a technical standpoint, the burden of proof was upon the plaintiff. The action of the trial court in putting the burden of proof and conferring the right to open and close the case upon the plaintiff was not erroneous.

Upon examination of the general charge, as well as the request for special charges, we are of opinion that there was no prejudicial error in respect to the charge.

The most difficult questions presented in the case are those involving the weight of evidence upon the second and third defenses.

The second defense challenges the good health of the assured at the time of the application and issuance of the policy. We think this was a question of fact to be determined by the jury. The burden of proof upon the merits of the case rested with the insurance company. The question was in the first instance one for the jury. The jury were entitled to consider the evidence of physicians, and others, having a direct bearing upon the question, and also the circumstances of the case. It must be kept in mind that the assured who made the application and procured the insurance was dead and his testimony unavailable. The insurance company was under the obligation to investigate the risk at the time of the application and issuance of the policy. The fact that it did make the investigation and did conclude to accept the risk is some evidence, we think, in favor of the plaintiff, and called upon the insurance company for evidence to overcome the effect of this presumption. In the case of *Mumaw v. Western & Southern Life Ins. Co.*, 97 Ohio St., 1 (119 N. E., 132), Judge Johnson speaks of "the difficulties and impracticable character" of compelling the beneficiary after the death of the assured to undertake the task of producing evidence of the good health of the assured at the time of the application and issuance of the policy.

He makes the following observations, at page 11:

"It is also common knowledge that policies are issued at the solicitation of the company, and it may well be said that it

is the duty of the insurance company not to enter into a contract of such a character until it is convinced that the insured is in good health. It would seem to be a just and reasonable proposition that the insured has a right to believe that the company has become so convinced, and to rely on his contract, in the absence of fraud or misrepresentations on his part, or a failure of some warranty made by him. In such case the company is not denied any proper defense; but, if it asserts a defense, it must assume the burden of proving it. The time to demand from the insured such satisfactory evidence is when the contract is being made and while the insured is alive."

Dr. Hatcher, who was called as a witness by the insurance company, testifies as follows:

"I said to him (Long) that he had better consult his physician and see whether or not he could not have his blood pressure reduced, feeling that it was not an organic type, and that if he was properly dieted and medicated that the blood pressure could be reduced and that he might be a favorable risk after that treatment."

If Dr. Hatcher, who had been especially consulted by Mr. Long, and who had the advantage of a personal examination, was of the opinion that the high blood pressure was not of an organic type and might be subject to treatment, certainly it would not be a far inference to assume that the assured himself felt that it was not a serious ailment or disease and might yield to a course of treatment.

Dr. A. H. Dunham was called by the insurance company as a witness. He made an examination of the assured prior to the present application for insurance. He testifies in full as to the nature and extent of his personal examination, and states he found nothing wrong with the heart or with any of the other organs and that the insured was in his opinion a good insurance risk.

Dr. D. B. Conklin made the medical examination upon which the insurance policy was issued. He testifies to the extent of his examination and his opinion as to the assured's good health.

Dr. Metler also testifies that Mr. Long was in splendid physical condition.

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The insurance company for its defense relies largely upon the testimony of Dr. Clark Sullivan, who was the physician of the assured and treated him at different times for what he called "mitral valve lesion of the heart." Dr. Sullivan's testimony was by deposition, and in his opinion the assured had been suffering from the affliction described.

The conflict in the testimony of these several physicians therefore became one of credibility and fell within the peculiar province of the jury.

The third defense, based upon misrepresentation, is subject to the following statute:

"Sec. 9391. No answer to any interrogatory made by an applicant, in his or her application for a policy, shall bar the right to recover upon any policy issued thereon, or be used in evidence upon any trial to recover upon such policy, unless it be clearly proved that such answer is willfully false, was fraudulently made, that it is material, and induced the company to issue the policy, and that but for such answer the policy would not have been issued; and, also that the agent or company had no knowledge of the falsity or fraud of such answer."

The questions and answers upon which the three defenses are founded are as follows:

"Question 14. I have never made an application nor submitted to an examination for life insurance upon which a policy has not been issued on the plan and premium rate originally applied for except to the following companies or associations: (if none, so state).

"A. None.

"Question 17. What illnesses, diseases, injuries or surgical operations have you had since childhood?

"A. Operation for left inguinal hernia; date 1900; duration two weeks; date of complete recovery 1900; Hemorrhoidal operation 1913; two days, very mild (removal of tags), complete recovery 1913 (Minor ailment).

"Question 18. State every physician or practitioner who had prescribed for or treated you or whom you have consulted in the past five years.

"A. Dr. Clark Sullivan, Dayton, Ohio, 1913, Hemorrhoids.

"Question 19. Have you stated in answer to question 17

all illnesses, diseases, injuries or surgical operations which you have had since childhood?

"A. Yes.

"Question 20. Have you stated in answer to question 18 every physician and practitioner consulted during the past five years and the dates of consultations?

"A. Yes.

"Question 21a. Are you in good health?

"A. Yes.

"Question 21b. If not, what is the impairment?

"A. None.

"Question 22b. How much weight have you lost in the past year?

"A. Seven pounds.

"Question 22c. If any change, state cause.

"A. Gymnastic training to reduce."

The insurance company offered evidence that a former application for insurance was made by the assured to another company and rejected.

It also offered the evidence of Dr. Clark Sullivan to the effect that shortly prior to the application in the present case he treated the assured to reduce the blood pressure, and that this was done at the request of Long for the avowed purpose on the part of Long of making him eligible for insurance, and that later the assured notified the witness that he did not desire to continue the treatment as he had obtained the insurance.

We would have no difficulty in finding that the answer to the interrogatory as to being rejected for other insurance was false and that the remaining answers did not fully disclose the facts. However, we think it was the duty of the jury before finding this defense complete to go further and find that the evidence clearly established that the answers to the interrogatories were wilfully false. The question of the credibility of the witnesses upon this particular issue was primarily for the jury to determine. The plaintiff in the very nature of the case was deprived of the answering and explanatory testimony of the assured. As to the rejection of a prior application for insurance the jury may have found that the assured was not fully advised of such rejection, or of the facts in respect to that ap-

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plication. The burden of proof being upon the insurance company, an inference might fairly be indulged under the evidence in favor of the plaintiff upon the issue as to the assured having knowledge and information on this subject.

In respect to the answers to the other interrogatories, it was for the jury to consider and determine whether the evidence made it clear that the assured willfully misrepresented the facts or willfully concealed material facts definitely called for by the interrogatories. In this connection it appears that the jury made the following special finding in response to interrogatories:

"Was William T. Long treated by Dr. Clark Sullivan at Dayton, Ohio, for excessive blood pressure and overweight in the summer or fall of 1916, and did Mr. Long know this fact when he made his answers to the Medical Examiner of the defendant Company, Dr. Conklin?

"A. Yes.

"Did William E. Long state every physician and practitioner whom he had consulted during the five years previous to making the application for the policy sued on, with dates of consultation?

"A. Yes."

The first special finding is not conclusive of the fact that the assured knew that "excessive blood pressure and overweight were illnesses, diseases," etc., within the general understanding of the application. One answer disclosed that the assured had undergone gymnastic training to reduce weight. Taking the answers together it would leave the question of blood pressure as the only question of real difficulty. This symptom has become somewhat alarming to physicians, but it is not clear that the assured as a layman understood the significance of high blood pressure and some weight would naturally be given by the jury to the fact that even the company itself did not consider overweight of sufficient importance to require a medical examination and report upon that feature. It is clear that special interrogatories must be harmonized with the general verdict unless they are clearly repugnant. *Davis v. Turner*, 69

Ohio St., 101 (68 N. E., 819), tends to support the second special finding of the jury's general verdict.

The burden of proof being upon the defendant, the jury were entitled to weigh the evidence and determine the credibility of witnesses. It is clear that the verdict of the jury should not be set aside upon the mere difference of opinion between the court and a jury. This is especially true where the case reaches a reviewing court and is heard upon the transcript of evidence. The rule is stated by Judge McIlvaine in the case of *Dean v. King, Pennock & King*, 22 Ohio St., 118, at page 134. While there is some foundation for difference of opinion upon the weight of the evidence, we have reached the conclusion that the verdict of the jury and judgment of the trial court upon the issues joined by the second and third defenses are not contrary to the clear and manifest weight of the evidence. Finding no prejudicial error the judgment is affirmed.

FERNEDING and KUNKLE, JJ., concur.

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#### PRIORITY BETWEEN MECHANICS' AND VENDORS' LIENS.

Court of Appeals for Lucas County.

GOLNER v. BEDE ET AL.

Decided, March 3, 1919.

*Liens—Vendor's Lien for Unpaid Purchase Money Superior to that of Mechanics or Materialmen—To What Mechanics' Liens Attach—Vendor's Lien not Waived by Acceptance of Mortgage—And is Prior to Claim of a Subsequent Mortgagee with Knowledge.*

1. By virtue of the provisions of Sections 8310 and 8321 General Code, as amended (103 O. L., 369), mechanics' liens attach to whatever interest one in possession of real estate may have therein, and to any interest he may subsequently acquire, but are subordinate to the lien of the vendor for unpaid purchase money.
2. A vendor's lien is not waived by the acceptance of a mortgage covering only the property conveyed, nor is its priority lost where a

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subsequent mortgage is left for record first, if such subsequent mortgage have knowledge that the vendor's lien is unpaid.

*Myer Geleerd*, for plaintiff.

*W. W. Campbell, Warren J. Duffey and George C. Bryce*  
contra.

RICHARDS, J.

Heard on appeal.

The controversy in this action arose over a question as to the priority of liens on a lot of land and dwelling house thereon in the city of Toledo, the plaintiff claiming to have a first lien by way of mortgage, the defendants, George E. Pomeroy and F. M. Fuller, claiming a first lien by way of mortgage and vendor's lien, and the defendants, The Collier-Barnett Company and The Toledo Pulp Plaster Company, claiming liens as materialmen for material supplied in the construction of the dwelling house on said lot.

The title to the lot stood in the name of George E. Pomeroy and F. M. Fuller, and under some arrangement between them and one Harry C. Smith, Smith took possession of the lot, made an excavation for a cellar and commenced the construction of foundation walls preparatory to the erection of a dwelling house. In July, 1917, while Smith had possession, the Toledo Pulp Plaster Company began furnishing material under a contract with him for the construction of said building, and in October, 1917, the Collier-Barnett Company began furnishing material therefore under a like contract. On November 6, 1917, Pomeroy and Fuller conveyed the premises, by warranty deed, to Harry C. Smith, and took from the grantee a mortgage for \$1,000 to secure the purchase money, the mortgage reciting that the same was for the purchase money, of the premises. On November 8, 1917, Harry C. Smith executed a mortgage on the same premises to the plaintiff, J. C. Golner, for \$2,500. The deed from Pomeroy and Fuller to Smith was left for record with the recorder of Lucas county on November 9, 1917, at 2 o'clock, p. m., the mortgage from Smith to Golner was left for record at 2:01 o'clock p. m., and the purchase

money mortgage from Smith to Pomeroy and Fuller was left for record at 2:35 o'clock p. m., of the same day. At the time of the execution of the mortgage from Smith to Golner the foundation wall of the cellar of the premises was partly constructed, and thereafter the mechanics' liens of the Toledo Pulp Plaster Company and the Collier Barnett Company were duly perfected. The lien claimed by Pomeroy and Fuller amounts to \$1,000 and interest, less some trifling payments. The mortgage held by Golner amounts to \$2,500 and interest, and the mechanics' liens held by the other named defendants amount to \$500 or \$600.

Under this state of fact we are called on to determine the priorities among these several lienholders, the property not being sufficiently valuable to pay all of them.

At the time the materialmen began furnishing material for the construction of the dwelling house, Smith had no deed for the property, but their liens would attach to such title as he had and would date from the time they furnished the first material, such being the provision of Secs. 8310 and 8321, G. C., as amended 103 Ohio Laws, 369. These liens, however, could not attach to an interest which Smith did not have; but when Smith subsequently acquired a complete title by conveyance from the owners, the liens of the materialmen would then attach to the title so acquired, but would be subordinate to the amount remaining due to the vendors, Pomeroy and Fuller. The claim of the vendors to be paid the amount remaining due to them on the purchase price of the premises would necessarily be paramount to the lien of the materialmen, under the doctrine of the *Mutual Aid Building & Loan Co. v. Gashe*, 56 Ohio St., 273. There would seem to be little difficulty in arriving at a conclusion that as between the vendors and the materialmen the lien of the vendors would be the prior one.

A more difficult question arises, however, when we come to consider the priority as between the claim of the vendors, Pomeroy and Fuller, and the mortgage of the plaintiff, Golner. While the mortgage of Pomeroy and Fuller was prior in point of time, and was for the purchase money of the premises, it

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was not left with the recorder for record until after the mortgage held by the plaintiff, Golner, and if the priority of right between these parties is to be determined by the mortgage alone, independent of the vendor's lien, Golner would, by the terms of Sec. 8542, G. C., have the first lien, because of the fact that his mortgage was first left for record with the county recorder. We must not, however, lose sight of the fact that Pomeroy and Fuller were the vendors and that the mortgage held by them represented simply the amount of the vendor's lien held by them, and the mortgage itself recites that fact. The record discloses that Golner had full knowledge of the fact that the amount due to Pomeroy and Fuller was the unpaid portion of the purchase money, and his mortgage was taken with such knowledge. He was very particular to see that the mortgage taken by him should appear first upon the record and insisted upon verifying that fact from an abstract of title, before he advanced any money under his mortgage. The abstract of title which was furnished to him showed that the mortgage held by Pomeroy and Fuller was to secure the unpaid purchase money. The evidence contained in the bill of exceptions fails to show any agreement between Golner and Pomeroy and Fuller that their claim should be subordinate to the claim of Golner. There is some testimony in the record that one Bede, who was about to buy the property of Smith, spoke of the fact that Pomeroy and Fuller were to have a second mortgage, but this would be mere hearsay and in no sense binding upon Pomeroy and Fuller, who were not present at the time such statement was made by Bede to Golner, and neither Bede nor Pomeroy nor Fuller was called as a witness. The plaintiff himself does not claim to have been present at the time any such agreement was made, if it was made. If the evidence established an agreement of that character there would be substantial reason for contending that the case falls within the rule announced by this court in *Walbridge v. Barrett*, 21 C. C., 522, and to insist that under such agreement the amount of unpaid purchase money should be paid to Golner. But, as we have said, it does not appear that any such agreement was made between the parties.

It is a fundamental law that the vendor's lien held by Pomeroy and Fuller was not extinguished by their taking a mortgage upon the same property to secure the payment of the amount due. *Elliott v. Platton*, 43 Ohio St., 198, 209.

It is insisted on behalf of Golner that he is entitled to protection by virtue of the terms of Sec. 8321-1, G. C., which was enacted to safeguard the rights of a mortgagee whose address is given in the mortgage and whose mortgage contains a covenant authorizing and empowering the mortgagee to proceed in accordance with that act. This contention is sufficiently answered by the fact that the mortgage taken by Golner contains no such covenant and no address, and is not, therefore, within the terms of that section. By virtue of the terms of Sec. 8321, G. C., the liens held by the materialmen are entitled to priority over the mortgage held by Golner. See also the *West Side Lumber & Manufacturing Co. v. Lancaster Paper Mill Co.*, 5 Ohio App., 253; 26 C. C. (N. S.), 413.

Under the facts contained in the record, the priorities of liens in this case are fixed and established as follows:

First, the vendor's lien held by Pomeroy and Fuller.

Second, the materialmen's liens held by the Toledo Pulp Plaster Company and the Collier-Barnett Company.

Third, the mortgage held by J. C. Golner.

Decree accordingly.

KINKADE and CHITTENDEN, JJ., concur.

**NEW TRIALS ON WEIGHT OF EVIDENCE.**

Court of Appeals for Greene County.

**MIAMI CONSER-VANCY DISTRICT v. SHADE ET AL.\***

Decided, December 2, 1919.

*Talesmen—Jury in Appropriation Case Under Conservancy Act may be Filled With—New Trials on Weight of the Evidence.*

1. In an appropriation case, under the conservancy act, the trial judge is required to fill vacancies in the panel by ordering the sheriff to fill the same with talesmen. The trial judge is not required to fill such vacancies by issuing a special venire.
2. Where a trial court has once granted a new trial upon the weight of the evidence, and the case has been retried, such trial court has no jurisdiction to grant a second new trial upon the weight of the evidence.
3. Where the trial court has no jurisdiction to grant a new trial upon the weight of the evidence, the court of appeals has no jurisdiction to grant a new trial upon the weight of the evidence or reverse the judgment of the trial court for refusing such new trial upon said ground.

*O. B. Brown, Mattern & Brumbaugh and Nevin & Kalbfus,*  
for plaintiff in error.

*Charles L. Darlington, Marcus Shoup and Harry B. Smith,*  
for defendants in error.

**KUNKLE, J.**

Heard on error.

This is a proceeding to appropriate land for conservancy purposes. The official appraisers of the Conservancy District appraised the land in question, which consists of 83.74 acres, at slightly less than \$190 per acre. The property owner appealed to the court of common pleas, as provided by Sec. 34 of the Conservancy Act (Sec. 6828-34, G. C.).

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\*Motion to require the Court of Appeals to certify its record in this case overruled by the Supreme Court, April 12, 1920.

Upon the first trial in the court of common pleas the jury returned a verdict fixing the value of the land at \$280 per acre. The trial court held that this verdict was excessive, and set aside the verdict upon the weight of the evidence.

The second trial resulted in a verdict fixing the value at \$303 per acre, plus.

Motion for a new trial was overruled and judgment rendered upon the verdict.

Various errors are assigned in the petition in error. The errors chiefly relied upon, however, are as follows:

1. Error in instructing the jury that a verdict might be returned by the concurrence of nine or more jurors.
2. Error in refusing to issue a special venire to fill the panel, and in ordering the sheriff to fill the panel.
3. The verdict is excessive and contrary to the weight of the evidence.

It is now definitely settled that the three-fourths jury law applies to cases of this nature, and this was conceded at the time of the hearing of the case in this court.

The question as to filling the panel is not without difficulty and some doubt.

The Conservancy Act (Sec. 6828-34, G. C.), provides:

“Which suit shall be proceeded with in accordance with the statute regulating appropriations by other than municipal corporations.”

Section 11051, G. C., which relates to appropriations by other than municipal corporations, provides for filling vacancies in the panel as follows:

“The judge shall order the sheriff to fill the vacancies with talesmen.”

This section further provides:

“The judge shall order the sheriff to fill the remaining vacancies in the jury box required to make up the number of twelve with talesmen.”

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1920.]Greene County.

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Counsel for plaintiff in error rely upon the following sections of the code, namely: Secs. 11212 and 11434. The material provisions of Sec. 11212 are as follows:

"The provisions of law governing civil proceedings in the court of common pleas, so far as applicable, shall govern like proceedings in the probate court, when there is no provision on the subject in this title." (Title 3, Part third.)

The material provisions of Sec. 11434 are as follows:

"When it is necessary to summon talesmen, the court, on the motion of either party, shall select them, and cause to be issued immediately a venire for as many persons having the qualification of a juror as, in the opinion of the court, may be necessary," etc.

It is contended by counsel for plaintiff in error that the word "talesmen," as used in Sec. 11051, is subject to the definition and description contained in Sec. 11434, and that both sections are to be considered together.

We are unable to reach the conclusion that Sec. 11434 was intended to define the word "talesmen." We think the latter section relates to the manner of selecting talesmen in cases not otherwise provided for.

The case at bar is governed by Sec. 11051, G. C., and rests upon the construction of that particular statute.

We think the fair construction of Sec. 11051 would be to uphold a trial court in refusing to proceed under Sec. 11434, and in following the express provisions of Sec. 11051.

There was, in our opinion, therefore, no prejudicial error in respect to the selection of a jury.

The remaining question relates to the weight of the evidence. The journal entry shows the first verdict was set aside by the trial court upon the weight of the evidence.

Section 11577, G. C., provides:

"The same court shall not grant more than one new trial on the weight of the evidence against the same party in the same case, nor shall the same court grant more than one judg-

ment of reversal on the weight of the evidence against the same party in the same case."

The trial court was not authorized to grant a second new trial upon the ground of the weight of the evidence. The court of appeals, being merely a reviewing court, would not, in our judgment, be authorized to reverse the judgment of the trial court on the weight of the evidence when the trial court was not authorized to set the verdict aside on such ground.

In other words, we could not find that the trial court committed prejudicial error in refusing to set aside the verdict upon the weight of the evidence, when such court was expressly prevented from so doing.

We have examined all of the grounds of error suggested by counsel for plaintiff in error, but finding no error in the record which we consider prejudicial to plaintiff in error, the judgment of the lower court will be affirmed.

ALLREAD and FERNEDING, JJ., concur.

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1920.]Cuyahoga County.

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**RELEIF TO DEFAULTING PARTIES UNDER LAND CONTRACTS.**

Court of Appeals for Cuyahoga County.

**CURTIS v. FACTORY SITE Co.**

Decided, July 2, 1919.

*Forfeiture Clauses—Failure of Purchasers to Perform Will be Disregarded, When—Enforceable where Time is the Essence of the Stipulation—Effect of Equivocal Conduct of Vendor as to his Rights under Forfeiture Clause.*

1. The usual forfeiture clause in a land contract will, on the failure of the purchaser to perform at the specified time, be disregarded and set aside by a court of equity, unless the failure is intentional or results in loss to the vendor which can not be compensated by interest.
2. Where the parties to a contract for the sale of land containing a forfeiture clause have so stipulated as to make time of payment the essence of the contract, a court of equity can not give relief to a defaulting party.
3. A court of equity will not regard time the essence of a land contract, so that forfeiture *ipso facto* occurs upon default of payment by vendee, where the vendor has the option to declare all payments due, or at his election to avoid the contract, repossess the premises and retain as stipulated damages all sums paid, and the conduct of the vendor fails to disclose an unequivocal intention to exercise his rights under the contract.

*Smith, Olds & Smith, for plaintiff.**Squire, Sanders & Dempsey, for defendant.*

DUNLAP, P. J.

Heard on appeal.

This is a suit for specific performance of a land contract, and is here heard upon appeal.

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\* Motion to require the Court of Appeals to certify its record in this case overruled by the Supreme Court, December 22, 1919.

The evidence discloses that on January 29, 1917, the Factory Site Co., the defendant, and the West Side Land & Supply Co., both corporations, entered into a written contract for the sale of certain real estate by the first-named corporation to the second-named corporation, its successors and assigns. The contract provided that the purchase price should be \$10,000 payable as follows:

"One Thousand Dollars cash in hand paid, the receipt whereof is hereby acknowledged; Two Thousand Dollars on or before thirty days from the date hereof; Two Thousand Dollars on or before eight months from the date hereof. When the aggregate amount of Five Thousand Dollars shall have been paid then the party of the first part shall execute its deed to the party of the second part, and contemporaneously therewith the party of the second part shall give its four promissory notes in equal amounts evidencing the remaining Five Thousand Dollars payable respectively in one, two, three and four years from the date of this contract, all bearing interest at the rate of six per cent. per annum payable semi-annually, and secured by a purchase money mortgage on the aforesaid premises."

The contract contained the following provision:

"If any one of said installments, or the interest accrued thereon, shall not be paid when due, then all of said installments remaining unpaid shall at once become due and payable, at the option of the party of the first part."

Also the following:

"In case default shall be made by the party of the second part, its successors and assigns, in any of the conditions above stipulated to be performed by it or them, it shall and will be lawful for the party of the first part, if it so elect, to treat this contract as henceforth void, and to re-enter upon said premises at any time after such default without serving on the party of the second part, or any person holding under it, a notice to quit said land; and in case this contract shall be so treated as thenceforth void, the party of the second part, or those claiming under it, shall thenceforth be deemed a mere tenant at will under said party of the first part, and be liable to be proceeded against without notice to quit, under the provisions of the law regulating proceedings in cases of forcible detainer; and the party of the first part, in such case, shall be at liberty to sell the land and premises to any person whatsoever without being liable in law or in equity to the party of the second part or any

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person claiming under it for any damages in consequence of such sale or to return any payments made on account of or under this contract, and the payments shall have been made may be retained by the party of the first party as stipulated damages for the non-performance of this contract on the part of the party of the second part."

The evidence further discloses that the West Side Sand & Supply Co., in its attempt to carry out the provisions of this contract, made the following payments:

January 23, 1917, six days before the signing of the contract, \$500, and on January 29, 1917, when the contract was signed, \$500, so that the initial payment was fully made; then upon August 18, 1917, the payment of \$2,000, which should have been made on March 1 (or thirty days after January 29), was made. Nothing further in the way of actual payment to the Factory Site Co., was made. The evidence, however, discloses that the Factory Site Co. is composed of three very eminent members of the Cleveland Bar, Mr. Dempsey, Mr. Squire and Judge Sanders; that the business of this company is transacted almost entirely by its president, Mr. Dempsey; and that on or about September 11, 1918, Mr. Dempsey, upon the solicitation of the Sand & Supply Co., consented to use his influence or the influence of his firm with the New York Central Ry. in the securing of a contract from said railroad company for the putting in of a switch, and accepted from the Sand & Supply Co., a deposit of \$1,000 which it was thought advisable to pay to the railroad company in advance upon said contract. The purpose of offering this evidence in the case to show that at any rate up to that time the Sand & Supply Co., was at least "*persona grata*" to Mr. Dempsey and that he had no sincere intention of declaring the contract forfeited, but that on the contrary, and in spite of some rather terrifying notices of which he had been the author, and which had been fruitful in forcing the payment of \$2,000 just a short time before, yet long after it was due, he had at heart the best interests of the "young fellows" who composed that company. It also had a tendency to show his knowledge of the improvements

which the Sand & Supply Co. was putting into the premises, which amounted at that time to about \$2,000; and it is to be here stated that the railroad company, no doubt influenced by Mr. Dempsey's persuasive words, after some delay entered into a contract with the Sand & Supply Co., in the early part of 1918, and the Sand & Supply Co. assumed the carrying out on its part of said contract, involving itself in a liability of several thousand dollars by reason thereof, and did the necessary grading, all at an expense of \$500, in the spring of 1918, long after the date fixed for the payment of the \$2,000 which by the terms of the contract was to become due in eight months after the making thereof, and the nonpayment of which now furnishes the sole basis for any claimed forfeiture which exists in this case.

It is most evident that up to the time of this payment Mr. Dempsey or his company had neither exercised the option which by the contract belonged to them, to make "all of the installments remaining unpaid \* \* \* become due any payable," nor elected to treat the contract as void. No amount of talk or conversation, pleadings on the one part or harsh threats upon the other, could override this plain and necessary conclusion, nor could mental reservations, or beliefs that steps looking to a forfeiture had been taken, have any effect upon the situation as it then existed. Any exercise of an option to make all the installments come due at once, or any election to treat the contract as void, must necessarily have been made after this time.

Now, the evidence shows that the next step taken by Mr. Dempsey was the writing of a letter on April 17, 1918, in which, among other things, the following language is used:

"I have extended to the West Side Sand & Supply Co. every reasonable courtesy, and while I do not say that the payment, if made on April 25th, together with all interest in arrears, will not be accepted, you must understand that I am not making any further extensions whatsoever."

Plainly there is no election here either to declare the remaining installments all due or to declare the contract void.

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The rights of the purchasers were again saved, assuming that Mr. Dempsey had a right to act for his company, and there is no intimation that he did not have such right. It may be said in passing that the Factory Site Co. appears affirmatively by the testimony to have taken no corporate action in the matter whatsoever. It would appear that Mr. Dempsey acted upon his own initiative all the time up to some time in September, 1918, when he called in Mr. Squire and informed him of the situation, and it is by virtue only of the words and actions of Mr. Dempsey that his corporation can claim the benefit of a forfeiture, and it is thus upon these words and acts that it must here succeed or fail.

On April 25, 1918, Mr. Farver, who was one of the officers of the West Side Sand & Supply Co., wrote Mr. Dempsey the following letter:

"I wish to advise that I will be unable to make payment as promised on the West Side Sand & Supply Co. land contract today as expected.

"The money is to be raised through the office of Guthery & Guthery and it will take more time than was anticipated at the time I wrote you.

"Mr. Lundwall and myself are having an uphill fight to put this matter through as there is a lack of harmony among those interested. However, we will accomplish it I am sure.

"I can not bring myself to ask further extensions from you, but I am going to say this that we have every reason to believe that we will have the payment with interest to offer you within the next ten days and hope that it will be acceptable to you at that time.

"Thanking you, I beg to be,

"Very truly yours,

"CHAS. S. FARVER."

This letter was not answer, and in our opinion matters remained in *statu quo*; *i. e.*, there was at this time no election and no forfeiture declared.

We think it is a general doctrine of equity, and held in a great numbers of cases, that the forfeiture provided for by a clause in a land contract, similar to the one here, will, on the

failure of the purchaser to fulfill at the proper time, be disregarded and set aside by a court of equity unless such failure is intentional or results in loss to the vendor which can not be compensated by interest, and we think that this conclusion is in plain accordance with the general principle of equity in relation to relief against forfeitures. It is not, however, the universal rule; but the decisions upholding a contrary decision seem to us to ignore the equitable principle of relief from penalties and forfeiture. It may be stated as settled that where the parties have so stipulated as to make the time of payment of the essence of the contract, a court of equity can not relieve a vendee who has made default, but the difficulty in applying this rule is to determine when time has thus been made essential. We think it self-evident that time can not be regarded as of the essence of a contract, so that a forfeiture shall *ipso facto* occur upon failure of the vendee to make a required payment, when the contract contains language to the effect that if any installments shall not be paid when due then all installments remaining unpaid shall at once become due and payable at the option of the vendor, and when the additional clause is inserted that in case of default it shall be lawful for the vendor, *if it so elect*, to treat the contract as void and re-enter upon the premises and retain the money paid as stipulated damages.

We think that under a contract like the one in the case at bar the happening of two things is essential to create a forfeiture; first, the exercise of an option to declare all unpaid installments due, which of itself presupposes and necessitates the giving of a reasonable notice and an opportunity to make those payments; and, second, an election to treat the contract as void. Even if the first step was not a requisite, can the election to so treat the contract be read in Mr. Dempsey's letter of April, 17th? We think not. We have examined Mr. Dempsey's testimony carefully and are unable to discover in it a recital of an intentional rescission of this contract. We of course can not be much impressed, or our judgment in any way affected, by any of the conversations he had with the vendee or its agents prior to the actual payment of the \$2,000 in August, 1917, nor

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by Mr. Seymour's letter, which was prior to that payment, which needs no other comment than the statement that after it was written this payment was accepted; and, taking his view of the conversation with Mr. Williams as correct, we are unable to find in it an unequivocal repudiation or rescission of the contract, outside of his statement that the contract is "forfeited and is now a dead letter," which statement appears to be only a statement of his conclusions regarding the situation. We find nothing therein which in and of itself creates a forfeiture. On the contrary we find him making suggestions as to how the situation might be cleared up. The following statement, for instance, is perfectly inconsistent with the idea that an unequivocal forfeiture was either declared or was in existence. Speaking of the fact that the contract was forfeited, he said:

"As far as that difficulty is concerned, I think of a way that might be arranged. The Factory Site Co. owes the Society for Savings some money, and it is among the possibilities that the society might take a mortgage of \$5,000, having it made directly to it, and credit that amount of money on the obligation of the Factory Site Co.

"Well,' he, Williams, said, 'Would you do that?'

"I said, 'No, I wouldn't say that I would.' I said, 'I will not say what I will do.' I said, 'If you get around where you know what you can do, and will do, and there is somebody talking that can talk with authority, and it will go through, I will consider propositions that may be made.'

That conversation was had some time in April or May of 1918. In the summer, Mr. Williams had another conversation with Mr. Dempsey, when Mr. Williams concededly told him that he was thinking of selling the property. The following ensued:

"'Have you a purchaser in mind?' He said, 'Yes,' and I said 'For what purpose?' and he said, 'A manufacturing purpose.' I said, 'Well, I would have no objection to that; that is what that land is for over there as far as we are concerned, that is what we expect to sell it for—a good factory there would be satisfactory to me, but I would want some other conditions surrounding it. \* \* \* Well, I will have to say to you, I will consider anything, because I will consider anything that a reasonable man brings to me, but I will not promise you a thing.'"

We thus reach the conclusion that the Factory Site Co. acting through its president, Mr. Dempsey, never took the proper steps to declare a forfeiture except in the very first instances where he had Mr. Seymour write a letter, but the effects of this letter were clearly obviated and the forfeiture waived by the acceptance of the next payment at a later date, and we find no similar action occurring later, and the necessary conclusion from the foregoing is that this contract had some validity at the time of the assignment to the plaintiff in this case, and that the plaintiff in this case is entitled to all the equitable rights of the West Side Sand & Supply Co.

Taking the case as a whole, we think it falls fairly within the spirit of the case of *Rummington v. Kelley*, 7 Ohio (part 2) 97, from which we quote the following at page 102:

"In case there has not been on the one part a strict compliance, still if the conduct of the opposite party has been such as to evince acquiescence in the delay, such acquiescence will be construed favorably for the party apparently in default, and the opposite party can not be exonerated from performance. For instance, a vendee takes possession of the land purchased, and with the knowledge and assent of the vendor makes lasting and valuable improvements; in such case, a court of equity would be inclined to enforce a specific performance, although payment of the purchase money had not been punctually made. More especially would this be the case where improvements had been made without objection, after default of payment. So the receipt of a part or the whole of the purchase money, after the time of payment had elapsed, might be construed into a waiver on the part of a vendor, of any advantage he might have taken in consequence of the default of the vendee. And the same would be the case, should the vendor by any other conduct manifest that he did not intend to insist upon a strict and literal performance by the other party. And even where the purchase money is payable in installments, and there should be a failure in the punctual payment of one of these installments, I am not prepared to say that a vendor should be exonerated from performance, if, within a reasonable time, the vendee should make payment."

A decree may be entered for the plaintiff, decreeing specific performance of this land contract, the defendant to exercise

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the option of whether it shall have the payment all in cash or in the manner of deferred payments as provided for in the contract. Defendant to pay the costs.

WASHBURN and VICKERY, JJ., concur.

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#### JURISDICTION LOST THROUGH DEFECTIVE APPEAL BOND.

Court of Appeals of Columbiana County.

RICH v. RUPERT.

Decided, November 8, 1919.

*Appeal—Party to Litigation Can Not Sign Bond as Surety—Bond so Signed Gives No Jurisdiction to the Court of Appeals.*

A party desiring to appeal is required to give an undertaking with sufficient surety, as provided in Section 12226 G. C., and where an appeal is attempted to be taken by one of several defendants, and the undertaking is signed by another defendant, such undertaking is a nullity, and is not such a compliance with Section 12226 as will give the court of appeals jurisdiction under Section 12232 to order the change or renewal of the undertaking or that a new one be given.

*C. C. Connell*, for plaintiff.

*C. S. Speaker*, for defendants.

PATTERSON, J.

On motion to dismiss appeal.

The plaintiff filed his petition against the defendants praying that they be enjoined from passing over certain portions of his lands.

A joint demurrer to this petition was filed by all the defendants, which was overruled. The defendant Martha J. Rupert then filed her answer and cross petition, and to this the

plaintiff filed his reply, and upon the issues thus joined the court of common pleas decreed

"That the defendants A. P. Rupert, Martha J. Rupert, Clarence Felger and Alma E. Felger, and all other persons claiming right, title or interest through or under them, be and they hereby are perpetually enjoined from traveling on, over or across plaintiff's lands along the south line thereof."

An appeal bond was filed and approved by the clerk within thirty days, which bond was signed by A. P. Rupert as principal and Martha J. Rupert as surety, both of whom are parties defendant.

A motion was filed in this court by the plaintiff to dismiss the appeal, for the reason that the defendants have not filed an undertaking with surety as provided by Sec. 12226, G. C., and the defendant A. P. Rupert filed his motion that should the court find the appeal bond defective, or the surety thereon not sufficient, it order the amendment, change or renewal of said bond, or that a new bond be given with security to be approved by the clerk.

Sec. 12226 sets forth the requirements of an undertaking in appeal.

Sec. 12232 is as follows:

"When a surety in an appeal bond has removed from the state, or is not sufficient, or in form or amount the bond is insufficient, on motion the court of appeals may order its change or renewal or that a new one be given, with security to be approved by the court or its clerk. If such order be complied with, the cause shall be heard and determined as though it had not been made; but otherwise the appeal must be dismissed."

In the case at bar there is no appeal bond *with surety*, the bond does not comply with the statutes relating to an undertaking in appeal, and the only question in the case is whether there is a sufficient compliance therewith to give the court jurisdiction to order its change or renewal or that a new one be given under Sec. 12232.

The defendants rely upon *Reformed Presbyterian Church v. Nelson*, 35 Ohio St., 638, as decisive of the question. This was

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an action to set aside a will, appealed by the plaintiffs to the district court, the bond in appeal being signed by two of the defendants, and the court overruled the motion to dismiss the appeal.

At page 641 the court say:

"In the present case, two of the defendants, William Forsyth and Thomas Mintier, executed the undertaking, or appeal bond, on behalf of the plaintiffs. The plaintiffs were the appellants, and as Forsythe and Mintier could not execute an undertaking, or a bond, to themselves, the instrument could only be operative in favor of the other defendants. Such an instrument, though not in conformity to the statute, was sufficient to give the appellate court jurisdiction, and to bring the case within the provisions of the act of April 8, 1856, supplementary to the act regulating appeals, S. & C. 1169."

' Had the bond been signed by the plaintiffs alone a very different question would have been presented to the court.

Our attention has been called to the case of *Shires v. Fesler*, 21 C. C. (N. S.), 253, the syllabus of which is as follows:

"Where steps have been taken by a party to give an appeal bond which is in proper form in every respect except that the same is signed by a party and not by a surety, and where such bond has been approved by the clerk, the court has authority to permit its amendment or renewal."

This case was decided December 12, 1914, and on January 20, 1915, the following entry appears:

"It appearing to the court that the entry heretofore made on the 29th day of October, 1914, was inadvertently drawn and made, the court hereby directs that said entry be set aside on the authority of *Steele v. Garn et al.*, being cause No. 14008, decided by the Supreme Court of Ohio November 24, 1914, and on the authority of said case the motion of plaintiff in this case to dismiss the appeal is hereby sustained and said appeal is hereby dismissed."

While this case was reversed by the court hearing it, and almost immediately after it was reported, yet nowhere in the

digest do we find any reference to the journal entry of reversal as quoted above.

We have before us the record in the case of *Steele v. Garn et al.*, 91 Ohio St., 381, reported without opinion, which record discloses the facts to be that the plaintiff, Edgar L. Steele, recovered a judgment against the defendants, Sadie Garn, Manie Garn, Fanny Kaufman and John Kaufman; that the defendant Sadie Garn undertook to perfect an appeal to the court of appeals and filed an appeal bond signed by herself and by the defendant John Kaufman. A motion was made to dismiss the appeal, which the court of appeals overruled. Error was prosecuted to the Supreme Court, and at page 381, will be found the journal entry of that court, as follows:

"It is ordered and adjudged by this court, that the judgment of the said circuit court be, and the same hereby is, reversed for the reason that said circuit court erred in overruling the motion of the plaintiff to dismiss the appeal on the grounds set forth in said motion. And coming now to render the judgment which the said circuit court should have rendered, it is hereby ordered and adjudged that the said appeal from the court of common pleas to the circuit be, and the same is hereby, dismissed, and this cause is remanded to the court of common pleas with instructions to carry its former judgment into execution."

The bond in the *Steele v. Garn* case is almost identical with the bond executed in the case at bar. In both bonds it is recited that one of the defendants desires to appeal; in both cases there were judgments against four defendants; in both bonds two of the defendants signed; in neither of the bonds is there any surety.

An undertaking such as was given, or attempted to be given, by the defendants in the case at bar is a nullity and therefore does not come within the curative provisions of Sec. 12232. It will be conceded that every attempt to give a bond can not be cured by this section. For instance, should a party attempt to give a good and sufficient bond thirty-five days after the rendition of judgment in the court below it would not be claimed

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that this bond could be amended or a new bond given to bring it within the purview of the section.

The motion of the plaintiff to dismiss the appeal will be sustained, and the motion of defendant to amend the bond, or give a new bond, will be overruled.

METCALFE, P. J., and POLLOCK, J., concur.

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**REJECTION OF EVIDENCE WHICH WOULD NOT HAVE  
CHANGED THE RESULT.**

Court of Appeals for Cuyahoga County.

THE CLEVELAND RAILWAY CO. v. HOYNES.

Decided, April 1, 1918.

*Error—In Rejecting Evidence—Not Ground for Reversal, When—Refusal to Admit Statement Signed by the Injured Man After the Accident.*

1. A judgment should not be reversed for the rejection of evidence on the ground that the same constitutes prejudicial error, unless there is some reason to think that its admission would have or might have resulted in a different verdict.
2. Where shortly after an accident the injured signed a statement containing details of the accident and at the trial gave testimony which contradicted in some particulars the written statement, the action of the court in refusing to admit the statement in evidence, while erroneous, did not constitute reversible error where the contents of such written statement were incorporated piecemeal in questions propounded to plaintiff and other witnesses, and were thus read before the jury.

*Squire, Sanders & Dempsey* and *W. C. Boyle*, for plaintiff in error.

*Wm. M. Byrnes*, for defendant in error.

Heard on error.

## LIEGLEY, J.

The parties stood in reverse order in the court below and for convenience will be mentioned herein as they there stood.

Plaintiff, Frances H. Hoynes, filed her petition in the common pleas court praying for damages for injuries which she sustained while a passenger on a street car of the defendant company. The same proceeded to trial with the intervention of a jury and resulted in a verdict and judgment for plaintiff, from which judgment error is prosecuted to this court to reverse the same.

The error assigned and relied upon by the defendant to obtain a reversal of this judgment is the rejection of evidence offered by the defendant.

The plaintiff offered herself and a witness, Mrs. Smith, and others, to sustain her claims. Both plaintiff and Mrs. Smith testified orally at the trial below. It is claimed by the defendant that both made written statements a few days after the date of the injuries sustained by plaintiff. It is claimed that each statement contains contradictions of the testimony given by each at the trial. The alleged contradictions relate principally to the location and the size and kind of a seat upon which the plaintiff was seated, and from which she fell and injured herself by reason of the careless and negligent handling of said street car by the employees of the defendant company.

Mrs. Smith gave her testimony in chief, and on cross examination was confronted with a written statement claimed to have been prepared by one Williams, an investigator for the company, and signed by her a few days after the accident. She claimed not to remember having signed it. The contents of the paper writing were then incorporated piecemeal in questions by the cross examiner to the witness, and inquiry made of her whether she did not so state to the investigator. The contents of the paper writing were thus read in the presence of the jury. The paper had not yet been identified, but was offered and rejected. The investigator, Williams, was called by the defense after the plaintiff had rested, who testified that the paper writing correctly recited the statements of this wit-

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ness made to him at the time, and that it was signed by her in his presence. It was again offered and rejected. Again, the entire contents of this paper writing were recited in questions to this witness, and inquiry made whether Mrs. Smith had so stated to him at the time of his investigation, to which questions the witness answered in all instances in the affirmative. Thus the contents of this paper were again recited in the presence of the jury.

The plaintiff took the stand in her own behalf and was examined in chief and cross examined by the defendant. On rebuttal she was recalled for further cross examination by the defendant, and inquiry made of her in reference to a certain written statement claimed by the defendant to have been made by her a few days after the accident. She was confronted with the written statement and asked whether she signed it, and her position was such that identification thereof became necessary to make it competent in proof. The entire contents of the written paper were then incorporated in various questions by the cross examiner, and the plaintiff was asked whether she had made those statements to the investigator, some of which she answered in the affirmative and some in the negative. The contents of this paper were thus read before the jury and in its presence. In surrebuttal one Petrash, an investigator for the company, was called by the defendant, who testified that he prepared the written statement for the plaintiff and that the same contained a true recital of her statements to him and that she signed the same. This written statement of the plaintiff was offered and rejected by the trial court.

These written statements do contain some matters contradictory and inconsistent with statements made by the witnesses at the trial. As stated, the contradictions relate to the location of the seat which the plaintiff occupied at the time of the accident, and its size and kind and direction with reference to the length of the car. Assuming that the statements were properly and sufficiently identified as claimed by the defendant, the same should have been admitted.

Was their exclusion prejudicial error? It is claimed in the briefs that the contradictions relate only to the location of the

seat occupied by the plaintiff and her manner of occupying the same. The jury had before it the statements of these witnesses made in chief. It also had before it the contents of the written papers by incorporation in questions by the cross examiner, and what the witness had to say about those written statements. It thereby had before it the alleged contradictions and inconsistencies. It did not have before it, and as exhibits to be taken with it to the jury room, the written statements themselves.

In this respect the facts of this case present a very much different situation than is presented in a number of Ohio authorities bearing upon this subject. In these authorities the jury was not acquainted with the contents of the paper writings or the character of the proof excluded. *Shriedley v. State*, 23 Ohio St., 130, and *Dilcher v. State*, 39 Ohio St., 130.

We think the greater weight of the authority is to the effect that a judgment should not be reversed for the rejection of evidence on the ground that the same constitutes prejudicial error, unless there is some reason to think that its admission would have or might have resulted in a different verdict. In view of the subject matter of the alleged contradictions and inconsistencies in the testimony of the plaintiff and Mrs. Smith given at the trial and their written statements made a few days after the accident, and in view of the further fact that the contents of these statements were before the jury one or more times by reason of the manner of the cross examination, and that the jury had before it the conduct of these witnesses in respect to these statements and what they had to say about them, we are unable to conjure up any hypothesis upon which it may be said the jury might have arrived at a different verdict if those written statements had been admitted and the jurors had had an opportunity to actually examine their contents. We do not think that error has intervened in the trial of this case prejudicial to the rights of the defendant. Jones on Evidence, Section 896.

The judgment of the court below is affirmed.

GRANT and DUNLAPP, JJ., concur.

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**AS TO THE RIGHT OF AN ACCUSED PERSON TO A  
PUBLIC TRIAL.**

Court of Appeals for Summit County.

**FRANK COLLETTI v. STATE.\*****Decided, May 23, 1919.**

*Criminal Law—Waiver by Defendant of Right to Accompany Jury to View the Premises—Dying Declarations—Exclusion of Public from Trial Because of Existence of Epidemic—Not Necessary to Find Defendant Guilty Beyond “All” Reasonable Doubt.*

1. The defendant in a criminal case has the right to accompany the jury upon a view of the premises, but this privilege may be waived or declined by the defendant, and he must then be deemed to have voluntarily absented himself. The court of common pleas having granted him the privilege of accompanying the jury is not bound to compel him to accept.
2. It is the better practice for the trial court to interrogate the witness in the absence of the jury, as to alleged dying declarations, and determine their admissibility; but where such dying declarations are admissible and shown to be such, it is not error to admit such evidence in the presence of the jury without first ascertaining its admissibility.
3. The accused is entitled to a public trial. This requirement is for his benefit that the public may see that he is fairly dealt with and not unjustly condemned; but where at the time of the trial a general epidemic prevails, under the police power the trial court upon its own motion may exclude the general public from the trial when the public health and welfare justify such exclusion and such exclusion does not operate unreasonably beyond the occasion of its enactment.
4. It is not error for the trial court to refuse to charge that the defendant must be found guilty beyond all reasonable doubt. This is requiring the state to produce a higher degree of proof than necessary for a conviction, and the state is required only to prove the accused guilty beyond a reasonable doubt.

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\*Motion to require the Court of Appeals to certify its record in this case overruled by the Supreme Court, November 25 1919.

*Anderson, Ormsby & Kennedy and Muser, Kimber & Huffman*, for plaintiff in error.

*C. G. Roetzel*, Pros. Atty., for defendant in error.

PATTERSON, J.

Heard on error.

The plaintiff in error, Frank Colletti, the defendant below, was indicted by the grand jury of Summit county for murder in the first degree, the indictment containing three counts, the first charging in brief that on the 10th day of August, 1918, the accused shot the decedent, Frank Abruzzi, on the left side of the abdomen, which wound caused his death. The second and third counts of the indictment charged the accused with shooting said Frank Abruzzi and inflicting two mortal wounds upon his back.

The proof shows that the shooting took place about nine o'clock in the evening, near the corner of Howard and Lods streets in the city of Akron, and that the decedent after the shooting was taken to the hospital and died there that night.

The jury found the defendant guilty of murder in the first degree, with a recommendation of mercy.

A motion for a new trial was duly filed, which was overruled by the trial court, and a petition in error was filed in this court to reverse the judgment of the court below.

Many errors occurring in the trial are assigned by counsel for plaintiff in error, of which the principal ones are the four following:

1. That the defendant below was not present when the jury viewed the premises.
2. That the alleged dying declarations of the decedent were not submitted in proper form, and were not admissible.
3. That the defendant did not have a public trial.
4. Errors in the charge of the court to the jury.

With regard to the first error complained of, the record at page 2 shows that before the statements of the prosecutor and the defendant were made the prosecutor requested that the jury view the premises. Thereupon the court inquired whether coun-

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sel for defendant "would prefer that, too," and the reply was, "We have no objection. We join in the request." The trial court proceeded to admonish the jury as to their duties and conduct during this view of the premises, and then inquired of counsel for the accused, "Do you want to take the defendant down, too?" To this Mr. Kimber, of counsel for the defense, replied, "No we waive that right to take the defendant down."

It is now contended on the part of the accused that neither he nor his counsel could waive the right of being present while the jury viewed the premises; that a view of the premises is a part of the trial and the accused must necessarily be present; and that his constitutional rights have therefore been violated, as well as his rights under Sec. 13676, G. C., in that this part of the trial was conducted without his presence.

Had the accused requested to be present upon a view of the premises, and the court refused this request, it would have been clearly error to have conducted this view against his objection. This is discussed in *Hotelling v. State* (3 C. C., 630; 2 Circ. Dec., 366), the third proposition of the syllabus of which is as follows:

"Where an order made by the court on motion of the prosecuting attorney, under Sec. 7283, R. S., that the jury view the premises where the alleged crime was committed, in charge of the sheriff and a person appointed by the court to point out the premises, it is error to permit such view in the absence of the accused and against his objection."

And at page 369 (634) *et seq.* in the opinion of the above case the court say:

"The counsel for the state then moved the court for an order that the jury view the premises where it was claimed the murder had been committed; the prisoner objected, the objection was overruled, and he excepted. The court made the order that the jury be conducted to the place in a body, in charge of the sheriff and a person appointed by the court, to point out the premises; and gave instructions that no other persons should be permitted to speak to the jury upon any matter con-

nected with the trial, while thus absent from the court room. The view was had, and the jury returned. This objection and exception is assigned for error. Section 7283 (R. S.), provides that whenever in the opinion of the court it is proper for the jurors to have a view of the place at which any material fact occurred, it may order them to be conducted in a body, under the charge of the sheriff, to the place which shall be shown to them by some person appointed by the court. And while the jurors are thus absent, no person other than the sheriff having them in charge, and the person appointed to show them the place, shall speak to them on any subject connected with the trial. Counsel for the prisoner contends that this section of the statutes is in violation of Art. 1, Sec. 10, of the Constitution, which provides that 'in any trial in any court, the party accused shall be allowed to appear and defend in person and with counsel; to demand the nature and cause of the accusation against him; to have a copy thereof, and to meet the witnesses face to face.'

"We do not think it necessary to pass upon the question whether this statute is in violation of the Constitution, unless its operation would necessarily preclude the accused from being present during the view of the premises. This it does not do. There is nothing to prevent him from being present, if permitted by the court, unless he would voluntarily waive such right. It is not his constitutional right to be present during the trial, but Sec. 7301 (R. S.), of the statute provides among other things 'that he shall not be tried unless personally present.' If the view of the premises was a part of the trial, it is certain he should have been present when the view was had."

In the above case it will be noted that the accused was not allowed the privilege of being present during the view of the premises by the jury, and that he duly excepted to his deprivation of this privilege. The record in this case shows no desire upon the part of the accused to be present at this view of the premises; he expressly waives his right to be present, and no exception is filed thereto. This would bring him under the rule laid down in *Blythe v. State*, 47 Ohio St., 234, in which case the entire opinion *per curiam* is as follows:

"A view of the place where the homicide occurred is expressly authorized by Section 7283, R. S., which makes no provision for the defendant on trial to accompany the jury when

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it is made. Section 7301, R. S., prescribes that, except in cases of misdemeanors, no one charged with an offense shall be tried in his absence.

"This section does not require the actual presence of the accused in court at all times during his trial, but prescribes that one out of the jurisdiction or control of the court can not be tried for a felony, and notwithstanding this section (7301, R. S.), one on trial for a felony and not in actual custody may pass in and out of the courtroom, and remain absent for considerable periods of time, without rendering the progress of the trial during his absence erroneous. Therefore, if a view such as is authorized by Sec. 7283, R. S., be a part of the trial within the meaning of Sec. 7301, R. S., yet, as the court of common pleas expressly granted to plaintiff in error, permission to accompany the jury when the view was taken, which privilege, under advice of counsel he declined to accept, he must be deemed to have voluntarily absented himself, and thereby waived his right and privilege to be present when the view was taken. The court of common pleas, having granted him the privilege to accompany the jury, was not bound to compel him to accept it."

It is clearly the established law in Ohio that the accused has the right to be present at such view of the premises, and it is error to deprive him of the right to be there if he so desires. On the other hand, it is equally clear that he may refuse to accompany the jury, that he may waive the right to be present. In either event, refusal to be present or a waiver of his right to be present, there is no error.

The entire testimony with reference to the question of the dying declarations of the decedent will be found upon pages 12 and 13 of the record, and the record in full upon this question is as follows:

"Q. Where did you see your husband? A. At the hospital.

"Q. And did he say anything to you at the hospital? A. Yes, sir.

"Q. What did he say to you?

"Mr. Kimber: I object.

"Mr. Laybourne: What did he say to you at the hospital?

"Mr. Kimber: I object to the question.

"The Court: You claim this is a dying declaration?

"Mr. Laybourne: Yes.

"Mr. Spencer: We will qualify this as a dying declaration.

"The Court: Will you show he believed he was in a dying condition?

"Mr. Spencer: Yes, that he realized he was dying and died a moment afterwards.

"Mr. Kimber: I still say it is objectionable. That must be shown first in this kind of a case.

"Mr. Spencer: It's all in this conversation, as to what he said about dying.

"The Court: You may answer and we will see whether it is competent or not.

"Defendant excepts.

"A. I said to him: 'Bernardino, who wounded you? Who hurt you?' He said: 'Frank Colletti.'

"Defendant asks to have answer excluded. Answer allowed to stand. Defendant excepts.

"Mr. Laybourne: Q. What else did he say? A. He said: 'When I got near him he shot me without any talk or anything.' Defendant objects to the answer and asks that it be excluded. Answer allowed to stand. Defendant excepts. 'He told me to send him to the electric chair.' Defendant asks to have the answer excluded. Answer allowed to stand. Defendant excepts. 'He sent for me at my house to assassinate me. Good-bye. I am dying.'

"Mr. Kimber: I ask to exclude this last part of the answer.

"The Court: It may stand. Defendant excepts.

"Mr. Kimber: And I ask to have all of the answer excluded now.

"The Court: No, I think the last answer qualifies the rest of it now. Defendant excepts."

In his twelfth ground in the motion for a new trial the accused complains of "errors of law and abuse of discretion in the admission of evidence as to a so-called dying declaration." In 1 Ruling Case Law, at page 527, dying declarations are defined as follows:

"In its broadest meaning a dying declaration is a statement made by a person under the fixed belief and moral conviction that his death is impending and certain to follow almost immediately. However, in the sense in which it is now used in law, a dying declaration is a statement made by a victim of a homicide while *in articulo mortis* and without hope of recovery, concerning the facts and circumstances under which the

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fatal injury was inflicted, where the statement is offered in evidence on the trial of the person charged with having caused the death of the declarant."

Dying declarations may be proven by any competent witness, and may be proven by the declarant's wife if she is a competent witness. The statements of the decedent should be limited to the *res gestae*. 1 Ruling Case Law, page 534:

"When it is remembered that by the admission in evidence of dying declarations the defendant is deprived of being brought face to face with the witness and of the benefits of cross-examination, and the declarant's statements are admitted without reference to the form of the questions to which they are responsive, which, in many instances, are leading as well as misleading to one in a weakened and dying condition, the protection of the liberties of the innocent, as well as in many cases the conviction of the guilty, demands that statements admitted under such circumstances be limited to the *res gestae*, and that the deceased be permitted to speak only of the transactions causing the death, with such accompanying statements and conduct as may throw light upon it. Dying declarations are, however, always admissible for the purpose of identifying the person who committed the crime."

Each and all of the answers and questions with reference to the alleged dying declarations are excepted to upon the part of the accused and great stress in the argument of counsel is laid upon the answer, "He told me to send him to the electric chair." That this was not properly a dying declaration, but showed rather a spirit of revenge. But it would seem that another view might be taken of this answer, because if the injured man were not dying, and did not feel that he was then *in extremis*, the accused could not be sent to the electric chair, because there would be no murder. Objection is also made to the answer, "When I got near him he shot me without any talk or anything." And it is claimed that this is not a part of the *res gestae*.

Declarations that are merely matters of opinion are not incompetent. In the case of *Wroe v. State*, 20 Ohio St., 460, the third proposition of the syllabus is as follows:

"In making a dying declaration, the defendant, in speaking of the fatal wound, said it was done without any provocation on his part. *Hela*, that this declaration was not incompetent as being mere matter of opinion."

Objection is also made to the form in which the alleged dying declarations were received. It being claimed that the court should have examined the widow without the presence of the jury, to see whether these declarations were admissible as dying declarations, and, if the court so found, that then the jury should be recalled and the evidence given to them; and, if not found to be competent by the court, that the jury, in that event, should not hear any of the purported evidence upon this line. Counsel for the state, however, claim that these were dying declarations, that the trial court found that they were, and that if the court so found there could be no error in their admission in the manner in which they were introduced. The last words, "Good-bye. I am dying," would certainly show that the decedent himself thought that he was *in extremis*, and if he so thought, and in fact was in a dying condition, and shortly thereafter did die, the alleged dying declarations were admissible and properly submitted to the jury for their consideration along with the rest of the evidence in the case.

It is further contended on the part of the plaintiff in error that he was deprived of the right of a public trial as guaranteed him by the Constitution, and page 231 of the record shows that the following proceedings were had with reference to the conduct of the trial:

"The Court: This morning the court made an order that no person should be permitted in the court room excepting the witness on the witness stand, the members of the bar, the officers of the court and the defendant and attorneys in the case, and the jurors and the newspaper men, on account of the health conditions that prevail. The court had no conference with counsel before it made that order and has just taken it up with counsel, and counsel on both sides agree that is the order that should go on, and with their consent the court will enforce that order rigidly.

"Mr. Kimber: I would say in that connection, your Honor,

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the only man we would like is an interpreter, this gentleman that has been here.

"The Court: You may permit him to remain."

It will be observed that on account of health conditions the trial court made this order without consulting either the state or the defense, and that some little time after making the order the court took the matter up with counsel, and the record shows that counsel on both sides agreed that the above order should go on and that with their consent the court should enforce the order. Thereupon counsel for the plaintiff in error requested that the interpreter be allowed to remain, which accordingly was done.

It is contended on the part of the plaintiff in error that neither he nor his counsel could waive the constitutional right to a public trial, and in support of this contention counsel cite the Constitution of Ohio, Art. 1, Sec. 10; the Federal Constitution, the 6th and 14th Amendments; also *Davis v. United States*, 247 Fed., 394; and, further, the case of *State v. Hensley*, 75 Ohio St., 255 (79 N. E., 462; 9 L. R. A. (N. S.), 277; 116 Am. St., 734; 9 Ann. Cas., 108).

In the case last cited the proceedings had are set forth as follows, at page 261:

"After the examination of the first witness, on the reassembling of court after the noon adjournment, the first day of the trial, the court announced that in view of the testimony expected to be given by the next witness he would continue the trial during the taking of the testimony of witnesses likely to give immoral or obscene testimony in the small court room, the probate court room, and directed the sheriff to admit no one to said room except the jury, defendant's counsel, members of the bar, newspaper men, and Grimes, defendant's witness. The order was made in open court in the presence and hearing of defendant and his counsel. No objection was made other than the statement by one of the defendant's counsel that the defense knew of no testimony that would be improper to be heard in a public trial. Thereupon the trial was transferred to the small room, and the judge, the jury, defendant, his counsel, a number of the bar and newspaper men, and the witness Grimes, went to the small room, where the court was opened and by

order of the court the general public was excluded during the taking of the testimony by the state in chief, and in reply or rebuttal, save as to one witness, a physician."

At page 263, in the same opinion, the court quote from Cooley's Constitutional Limitations (6 Ed.), 379:

"It is also requisite that the trial be *public*. By this is not meant that every person who sees fit shall in all cases be permitted to attend criminal trials; because there are many cases where, from the character of the charge and the nature of the evidence by which it is to be supported, the motives to attend the trial on the part of portions of the community would be of the worst character, and where a regard to public morals and public decency would require that at least the young be excluded from hearing and witnessing the evidences of human depravity which the trial must necessarily bring to light. The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions; and the requirement is fairly observed if, without partiality or favoritism, a reasonable proportion of the public is suffered to attend, notwithstanding that those persons whose presence could be of no service to the accused, and who would only be drawn thither by a prurient curiosity, are excluded altogether."

The court further discuss the question of a public trial, at pages 265 and 266:

"It is not intended here to indicate that the trial judge is without power to exclude from the court room during the trial of a criminal case individuals, though adults, who are, by reason of habits or physical condition, personally obnoxious, or persons who by their conduct interrupt the orderly course of business, or the power to clear the room of general spectators who, as in *Grimmett v. State*, 22 Texas App., 36 (2 S. W., 631), were so boisterous and insubordinate as to intimidate witnesses, and where it was impossible to distinguish those who participated from those who did not; nor is it doubted that persons whose attendance is for the express and only purpose of using the information thus obtained in a way calculated to directly obstruct the administration of justice may be excluded. Perhaps, too,

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the character known as the 'court room loafer,' whose attendance would be induced only by prurient curiosity, might be excluded without harm to the defendant, or prejudice to the state, although the matter of determining with certainty just who should, and who should not, be included in this category in the given instance, might not always be easy of solution. Much should be, and we think is, necessarily and properly left to the trial judge, who is obliged to insist upon the orderly conduct of the public business, and whose highest duty is the securing to the parties, the defendant as well as the state, a fair and impartial trial; but the people have the right to know what is being done in their courts, and free observation and the utmost freedom of discussion of the proceedings of public tribunals that is consistent with truth and decency tends to the public welfare. We agree with the holding of the circuit court in the case at bar that the order of exclusion was too general in character and its limitations of admission too restrictive, and that the defendant was not accorded such a public trial as is guaranteed by the Constitution.

"It is, however, insisted by counsel for the state that because no specific objection or exception was entered by the defendant at the time the order was made or was being enforced, the error, if any was committed, can not now be taken advantage of. This objection ignores the force and effect of the constitutional provision. The right to a public trial is guaranteed. It is of the same high order of right as the other guarantees embodied in the section: that to appear and defend in person and with counsel; that to meet the witnesses face to face and have compulsory process, and that to a trial by jury. The right can not be waived by silence any more than can the right to be tried by jury where the accusation is a felony and the plea is not guilty."

It will be observed that in the above case the defendant did not agree to the adjournment of the court to a small room and the exclusion of the general public, but simply remained silent, unless the statement of counsel that he knew of no such testimony should be considered as an objection.

In the case at bar the trial court, upon his own motion, recognized the fact that there was prevalent in the country and in the city an epidemic of Spanish influenza, and any power that the trial court should have to exclude the general public from the trial or to prevent the assemblage of a large number

of people on account of the then prevailing epidemic would arise by virtue of the police power. In 6 Ruling Case Law, at page 183, the nature of police power is defined as follows:

*"Nature of Police Power.* The police power is an attribute of sovereignty, possessed by every sovereign state, and is a necessary attribute of every civilized government. It is inherent in the states of the American Union and is not a grant derived from or under any written constitution. It has been said that the very existence of government depends on it, as well as the security of social order, the life and health of the citizen, and the enjoyment of private and social life and the beneficial use of property. It has been described as the most essential, at times the most insistent, and always one of the least limitable of the powers of government.

*"Difficulty of Definition.* While there have been many attempts to define the police power, it has not yet received a full and complete definition. The difficulty has been frequently commented on, and it has been said that the police power is from its nature incapable of any exact definition or limitation, because none can foresee the ever-changing conditions which may call for its exercise. The boundary line which divides the police power of the state from the other functions of government, is often difficult to discern, and the limitations of the power have never been drawn with exactness. It has been said repeatedly that it is much easier to perceive and realize the existence and sources of this power, than to mark its boundaries, or prescribe limits to its exercise."

On page 189 in the same work police power is further discussed as follows:

*"Plasticity of Police Power.* The police power of the state, never having been exactly defined or circumscribed by fixed limits, is considered as being capable of development and modification within certain limits, so that the powers of governmental control may be adequate to meet changing social, economic, and political conditions. It is very broad and comprehensive, and is liberally understood and applied. The changing conditions of society may make it imperative for the state to exercise additional powers, and the welfare of society may demand that the state should assume such powers."

On page 193 there is the following on the subject:

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"Where appellate courts are called on to determine the validity of police regulations they frequently incline towards acquiescing in the opinion of local tribunals and bodies, because the latter are familiar with local conditions and are in a better position to judge of the necessity of such enactments. Considerable latitude is sometimes allowed for possible peculiar conditions as to which the appellate court may have but little knowledge."

And also on page 195 as follows:

"*Constitutional Rights as Limiting Police Power.* A police regulation, obviously intended as such, and not operating unreasonably beyond the occasions of its enactment, is not rendered invalid by the fact that it may affect incidentally the exercise of some right guaranteed by the Constitution."

The police power has been referred to in a great many Ohio decisions and we will refer to only a few of them.

In *Phillips v. State*, 77 Ohio St., 214, at page 216, the court say:

"It is almost an axiom that anything which is reasonable and necessary to secure the peace, safety, morals and best interests of the commonwealth may be done under the police power; and this implies that private rights exist subject to the public welfare."

In *Mirick v. Gims*, 79 Ohio St., 174, at page 178, the court say:

"The police power is an attribute of sovereignty and has its origin, purpose and scope in the general welfare, or as it is often expressed, the public safety, public health and public morals. These terms indicate its field, yet its boundaries are necessarily vague and indefinable."

The question is further discussed in the case of *State v. Boone*, 84 Ohio St., 346, at page 351:

"The police power is inherent in sovereignty; and its exercise is justified by the necessity of the occasion. Its foundation is the right and duty of the government to provide for the common welfare of the governed. It is tersely expressed in the maxim, '*Salus populi suprema lex.*'"

And in the case of *Toledo Disposal Co. v. State*, 89 Ohio St., 230, the first proposition of the syllabus is:

"In the exercise of the police power, the state and municipal authorities may make all such provisions as are reasonable, necessary and appropriate for the protection of the public health and comfort, and when any such provision has a real and substantial relation to that object and does not interfere with the enjoyment of private rights beyond the necessities of the situation, every intendment is to be made in favor of its lawfulness."

It is recognized that the accused is entitled to a public trial, and that the trial of criminals and their punishment has a two-fold effect not only to punish the one convicted, but that his trial and punishment may deter others from committing similar offenses, so that the accused and the public, in a sense, are interested in a public trial.

In the case at bar the trial court familiar with local conditions took the view under the prevalence of an epidemic that the public health and welfare, not only of the spectators themselves, but of the court, officers and jury as well, required that there be no assemblage of the people at that time in the court room. We are all familiar with the fact that at and about this time schools and churches were closed, the right of public assemblage was prohibited to the people and these were all necessary police regulations designed to stamp out the further extension of the then existing epidemic. In this respect the case at bar differs from the authorities cited. No authority has been cited to us raising the question of the right of the court to exclude the general public from the court room in case of an epidemic such as existed at or about the time of this trial. And we are inclined to the view that the court acting for the general public welfare exercised his privilege, and that it was his duty for the promotion of public health and welfare to proceed with the trial as he did. And it is evident from the record that the counsel for the accused recognized that these conditions existed and consented to the further exclusion of the public from the trial, and that there was no error prejudicial to the plaintiff in error in thus excluding them.

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It is insisted by counsel in their brief and also in oral argument that the words "beyond *all* reasonable doubt" should have been used in the charge of the court instead of the words "beyond *a* reasonable doubt." No authority is cited to us showing wherein the word *all* has ever been used in this connection, and an examination of the reported cases in Ohio discloses the fact that the words "a reasonable doubt" are used in the following cases: *Clark v. State*, 12 Ohio 483; *Farrar v. State*, 2 Ohio St., 54; *Adams v. State*, 31 Ohio St., 462; *Morehead v. State*, 34 Ohio St., 212; *Morgan v. State*, 48 Ohio St., 371; *McGuire v. State*, 3 C. C., 371; 2 Circ. Dec., 318; *Breck v. State*, 4 C. C., 160; 2 Circ. Dec., 477; *Ditzler v. State*, 4 C. C., 551; 2 Circ. Dec., 702; *Altschul v. State*, 8 C. C., 214; 4 Circ. Dec., 402; *Neifield v. State*, 3 C. C. (N. S.), 551; *Lindsey v. State*, 69 Ohio St., 215; *State v. Schiller*, 70 Ohio St., 1; *Hutchinson v. State*, 8 C. C. (N. S.), 313; *Ryan v. State*, 10 C. C. (N. S.), 497; and *Wray v. State*, 5 C. C. (N. S.), 437.

The term "beyond *a* reasonable doubt" is also used in Sec. 12399, G. C., being the section which defines murder in the first degree.

In the light of these authorities had the word "*all*" been used before "reasonable doubt," we think it would have been error in the charge of which the state would have had just right to complain, and that there was no error in the charge as given with reference to the degree of proof required in a criminal case, namely, beyond a reasonable doubt.

Further complaint is made that the court erred in not charging the jury with reference to the alleged dying declarations admitted in evidence in the case. The record does not show any special request for such a charge by the counsel for plaintiff in error, and it was admitted in the argument that no special request as to this evidence was made to the court. In regard to this contention we think the rule is well established that counsel for the plaintiff in error can not complain of the omission of the court to charge in this respect when no request for the same was made at the time of the trial. The rule is aptly stated in the case of *State v. Schiller, supra*, where at page 8 the court say:

"No request was made by defendant, or his counsel, for any further or additional charge on this subject, and no objection was made or exception taken to this particular portion of the charge as given, the only exception taken or noted by counsel for defendant, being a general exception to the charge as a whole. It is a familiar and very general rule of practice, applicable alike to criminal and civil cases, that mere partial non-direction, or incomplete instruction, as to a particular matter or issue, does not of itself constitute reversible error, in the absence of a request for more specific and comprehensive instructions upon the particular point or issue involved."

We have examined the entire charge of the court and think that in his charge the court stated the law correctly and that there were no errors in it prejudicial to the rights of the plaintiff in error.

This disposes of the principal contentions made on behalf of the plaintiff in error. Many other errors are assigned, but we have examined the entire record and find no errors therein prejudicial to the rights of the plaintiff in error, and the judgment of the court of common pleas is therefore affirmed.

WASHBURN and VICKERY, JJ., concur.

**LIFE TENANT TAKES AS A REVERSIONER.**

Court of Appeals for Fayette County.

(Shohl, P. J., Hamilton and Cushing, J. J., of First District, sitting by designation in the places of Allread, P. J., Ferneding and Kunkle, JJ., of the Second District.

**HERSCHEL D. CHAFFIN v. TRYPHENA DIXON ET AL.\***

Decided, March, 1920.

*Wills—Seizin in Deed as Distinguished from Seizin in Law—Root or Stock from which an Inheritance by Right of Blood is Derived—Son of Testator, Made a Life Tenant under the Will, Takes an Interest in the same Property as a Reversioner.*

The testator devised certain real property to his son F for life and then over to the heirs of his body forever, with no residuary clause or other disposition of the demised property. The son survived the testator and died testate without issue.

*Held:* The testator died intestate as to the reversion, and the son F became vested immediately with his undivided share of the reversion, and title thereto was transmitted by his will.

*Hidy & Sanderson and Post & Reid*, for plaintiff in error.  
*Gregg, Patton & Gregg*, for defendants in error.

**SHOHL, P. J.**

Solomon Chaffin, the father of the parties, died in March, 1914, leaving a will whereby he devised the premises in controversy in the following language:

ITEM 1. "I give and devise to my son Franklin A. Chaffin, during his natural life, and then to the heirs of his body forever, the following described real estate, situate in the county of Fayette, state of Ohio. \* \* \*."

The will contained no residuary clause and made no disposition of the premises except the foregoing.

\*Motion to require the Court of Appeals to certify its record in this case overruled by the Supreme Court, May 17, 1920.

Solomon Chaffin left surviving him four children, one of whom was Franklin. Franklin A. Chaffin was childless at the death of his father and remained so until his death in May, 1919, leaving no heirs of his body and leaving a will which was duly probated in the probate court of Fayette county, whereby he devised to his brother, Herschel D. Chaffin, any and all interest that he had or was entitled to in the property in controversy. Thereafter, Tryphena Dixon brought an action in the court of common pleas of Fayette county, praying that the premises in question be partitioned, and for such proceedings as are authorized by law, claiming to own a one-third part of the premises, as heir at law of Solomon Chaffin, deceased. Herschel D. Chaffin by answer and cross-petition set up the facts hereinbefore recited. Plaintiff demurred to the answer and cross-petition. The court sustained the demurrer and ordered partition finding that Tryphena Dixon, Herschel D. Chaffin and Loten W. Chaffin, each have a legal right to the undivided one-third part of the real estate. Error is prosecuted to the judgment by Herschel D. Chaffin.

The controversy is as to the legal effect of the will of Solomon Chaffin. The defendants in error claim that each of the three children of Solomon Chaffin surviving Franklin is entitled to one-third of the premises. The plaintiff in error contends that he is entitled to one-half of the premises, one-fourth as heir of Solomon Chaffin and one-fourth as devisee of Franklin A. Chaffin, who inherited one-fourth as one of the heirs at law of Solomon Chaffin.

The following propositions are not disputed:

*First.* All the parties derive their title either mediately or immediately by descent from Solomon Chaffin and not by devise under his will.

*Second.* That under the will of Solomon Chaffin, Franklin A. Chaffin, by virtue of General Code, Section 10578, took a life estate with remainder over in fee to the heirs of his body, and that upon the death of Franklin A. Chaffin, without heirs of his body, the remainder failed for want of any one qualified to take it.

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*Third.* That Solomon Chaffin died intestate as to the reversion in the property in the event of Franklin A. Chaffin's death without heirs of his body.

At the death of Solomon Chaffin, he left four children surviving him. Had he made no disposition whatever of his estate in the land, except to give a life estate therein to Franklin, an intestacy as to the reversion would have been immediately apparent, and each of the four children would then have had a vested interest in one-fourth of the reversion. The statute, General Code, Section 8573, provides:

"When a person dies intestate, having title or right to any real estate or inheritance in this state \* \* \* such estate shall descend and pass in parcenary to his or her kindred in the following course; 1st, to the children of such intestate or their legal representatives \* \* \*."

What is the effect, therefore, of the further gift to the heirs of the body of Franklin A. Chaffin? General Code, Section 10758 abrogates the rule in Shelley's case as to wills.

Upon principle and authority there is a contingent remainder to the heirs of the body of Franklin. 1 Tiffany on Real Property, Section 120, page 283. The descent was cast upon the death of Solomon Chaffin. A reversion in fee, therefore, upon the death of Solomon passed to and vested in his heirs at law, subject to being divested upon the birth of children of the life tenant. *Gilpin v. Williams*, 25 O. S., 283, 295, 296; *In re Youtsey*, 260 Fed., 423; *Fearne on Remainders*, 351; *Jeffers v. Lampson*, 10 O. S., 101; *Garver v. Jackson*, 4 Peters, 1, 89, 90; *Doe v. Considine*, 6 Wall., 458, 477.

Franklin A. Chaffin, therefore, as one of the heirs of his father, was vested with a one-fourth interest in the premises by descent, just as were his brothers and sisters. The fact that Solomon Chaffin by will limited the estate of Franklin to an estate for life does not exclude him from any further interest which might come by reason of an intestacy. Even had the testator made an express provision to that effect, he could not exclude one of his heirs at law from participation in prop-

erty which he had not disposed of. *Crane v. Doty*, 1 O. S., 279, 283; *Needles, Executor, v. Needles et al*, 7 O. S., 432, 445; *Bane v. Wick*, 14 O. S., 505, 508; *Gilpin v. Williams*, 17 O. S., 396; *Leopold, Exec., v. Weaver*, 9 App., 379.

Reference was made in the argument to the common law rule summed up in the maxim *seisina facit stipitem* or "seisin makes the stock of descent." The rule is thus stated in 24 A. & E. Ency. of Law, 1st Ed., 357:

"The effect of the common law rule that descent must be traced from the first purchaser, together with its auxiliary doctrine expressed in the maxim *seisina facit stipitem* is, then, that the claimant must show kinship to the person who last died seized in deed. Though the law passes an inheritance upon the heir immediately upon the ancestor's death, he thereby only acquired a seisin in law, and this alone would not enable him to transmit the inheritance to his heirs; for at common law, no one could be a *stirps* from whom a descent could be derived, unless he had been actually seized. \* \* \* He could not be counted an ancestor who had only a bare right or title to enter, or be otherwise seized \* \* \*. It may, then, be stated as the clear result of all the authorities that, whenever a person succeeds to an inheritance by descent, he must have obtained an actual seizin or possession, or seizin in deed, as contradistinguished from seizin in law, in order to make himself the root or stock from which the future inheritance by right of blood must have been derived; that is, in other words, in order to make the estate transmissible to his heirs. If, therefore, the heir on whom the inheritance has been cast by descent, dies before he has acquired the requisite seizin, his ancestor, and not himself, becomes the person last seized of the inheritance, and to whom the claimants must make themselves heirs."

Under this rule, the heirs of the reversioner can not have seisin until the determination of the particular estate, and if one of those heirs had died during the existence of the particular estate, he would not have died seized and could not be the stock or stirps through whom descent could be derived; but the same authority says:

"But this common law doctrine is now changed by statute in England and is generally rejected throughout the United

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States, where ownership or title to property is substituted for seisin, and the heir takes all the real estate owned by the ancestor at the time of his death. So, the heirs of a reversioner or remainderman take as absolutely as if their ancestor were actually seised as of a free hold in possession; the word "seised," when applied to such an interest, becomes equivalent to owning and "seisin" to ownership. A remainderman or reversioner, therefore becomes a proper stock of descent, and the remainder or reversion of one dying intestate will go among his heirs in the same manner as an estate in possession." 24 A. & E. Ency., page 358, 359.

As has already been noted under General Code, Section 8573, the heir inherits from an ancestor "having title or right to any real estate," and without regard to seisin. See *Gibson v. McNeely*, 11 O. S., 131; 3 Washburn on Real Property, 6th Ed. Section 1847; 2 Tiffany on Real Property, page 983.

It is insisted, however, that the claim of plaintiff in error is in conflict with the decisions in the cases of *Bunnell v. Evans*, 26 O. S., 409, and *Cultice v. Mills*, 97 O. S., 112. Each of those cases contain language not in harmony with the view hereinbefore expressed. The actual decision in the case of *Bunnell v. Evans* as shown by the syllabus is that where a gift is made to a son of the testator for his natural life and then to his heirs, and in another part of the will the word "heirs" is used in the sense of "children" that the son took a life estate only with remainder to his children, or issue, and not to his heirs generally, that upon his death without issue the devise in remainder failed, and the estate reverted to the heirs of the testator. While Welch, C. J., in the course of the opinion stated those persons whom he considered the heirs of the testator, the proposition was not actually decided.

In the case of *Cultice v. Mills*, the facts were practically the same as in the case of *Bunnell v. Evans*. The controversy turned upon the meaning of the term "heirs" as used in the will. The wife of the life tenant, John Mills, claimed to be the owner of the real estate in fee simple under the will of Thomas Mills as the "heir" of John. The briefs and records in the Supreme Court, to which we have had access, show that the claim made

in this case was not presented to the court there. The widow of John never made the contention that she was entitled to John's share which he got by reason of the partial intestacy of his father. The Supreme Court never having passed upon the precise point, the decision ought not to be regarded as changing the rule established by decisions which are the settled law of Ohio.

We are of opinion, therefore, that upon the death of Solomon Chaffin he was intestate as to a reversion. The right of Franklin A. Chaffin to an undivided fourth in this reversion vested immediately subject to being divested by the happening of the contingencies provided for in the will, and Franklin was able to and did transmit his interest to his brother Herschel D. Chaffin. See *Gillis v. Long*, 10 O. D., 253, 269, 270. Herschel D. Chaffin under the facts admitted by the demurrer was the owner of a one-half interest in the land.

The judgment will be reversed.

HAMILTON and CUSHING, JJ., concur.

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BINDING NATURE OF A JUDGMENT IN AN ACTION  
BY A MINOR.

Court of Appeals for Cuyahoga County.

Judges of the Second Appellate District sitting by designation in place  
of the Judges of the Eighth District.

ISABEL L. CUNNINGHAM v. THE CLEVELAND CONSOLIDATED  
BOTTLING WORKS COMPANY.

Decided, March 17, 1920.

*Infant—Judgment in an Action by—May be Impeached for Fraud or Unfairness Only—Irrregularities not Appearing on Face of the Record not Ground for Vacating—Injuries Prove More Serious than was Supposed at Time Judgment was Taken.*

1. A judgment in an action by a minor by next friend is valid and binding upon the minor, unless vacated for errors appearing on

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the record or impeached for fraud or unfairness in obtaining the judgment.

2. C, a minor by next friend, brought suit and recovered judgment for \$500 for personal injuries. The judgment was paid. The minor after arriving at full age brought suit to vacate and open up the former judgment for certain alleged irregularities not appearing upon the face of the record. No fraud or unfairness in obtaining the judgment is charged: *held*, no cause of action.
3. Evidence showing that since the trial and judgment the injuries to the minor have developed more seriously than was or could have been anticipated at the time of said trial and judgment does not sustain a claim of newly discovered evidence nor form the basis for an equitable impeachment of the judgment.
4. The averment that the former judgment was rendered by consent and without evidence of the nature and extent of the injuries is not of itself sufficient to require the vacation and opening up of the judgment, where the record shows affirmatively that evidence was offered and where no fraud or unfairness in the rendition of the judgment is shown.

*A. B. Oakes*, for plaintiff in error.

*Bernstein & Bernstein*, contra.

**ALLREAD, J.**

The judgment sought to be reviewed was rendered in an action or proceeding to vacate or modify a former judgment. The petition for modification of the former judgment contains a full recital of the record in said former case. From this record it appears that Isabel L. Cunningham, by her next friend, brought suit against the Cleveland Consolidated Bottling Works Company in the court of common pleas and on December 12th, 1906, recovered a judgment for the sum of \$500 and costs. The judgment entry shows that the parties waived a jury and submitted the case upon the pleadings and evidence. The plaintiff complains of the former judgment upon the grounds

- (1) That the court erred in rendering said judgment for only \$500 as that amount is grossly inadequate.
- (2) That the court erred in that it heard no evidence in the case other than the pleadings.
- (3) That the court erred in determining the case without knowledge of the extent of plaintiff's injuries; and

(4) That the court erred in rendering judgment in favor of plaintiff for only \$500 for the reason that the injuries are more serious than they appeared to be at the time said judgment was rendered and the damages could not have been reasonably anticipated, and were not anticipated or taken into consideration by said court in fixing the amount of said judgment, and the said injuries have since proven to be more serious and permanent than was anticipated; also that the plaintiff is now in possession of newly discovered evidence to show that her injuries were much more serious than were or could have been anticipated by her physician at the time.

Plaintiff relies upon Section 11631, G. C., which provides:

"The common pleas court or the court of appeals may vacate or modify its own judgment after the term at which it was made \* \* \* (5) for erroneous proceedings against an infant, \* \* \* when the condition of such defendant does not appear in the record nor the error in the proceedings \* \* \* (8) for errors in the judgment sought by an infant within twelve months after arriving at full age as prescribed in Section 11603."

Section 11603, provides:

"It shall not be necessary to reserve in the judgment or order, the right of a minor to show cause against it after attaining the age of majority; but in any case in which, but for this section, such reservation would have been proper, within one year after his majority a minor may show cause against such judgment or order."

Section 11603 is found substantially in the same form in Section 386 of the Practice Code adopted March 11, 1853.

In *Long v. Mulford*, 17 O. S., 485, it was held that the remedy of an infant to open up or vacate a judgment against him in infancy was either by bill of review to review the record or by bill in equity to impeach the judgment.

In the case of *Carey v. Kemper*, 45 O. S., 93, it is held that the remedy of the infant under the 6th paragraph of Section 5354, R. S. (now 11631, G. C.), was by a proceeding in the nature of a bill of review. It is further held in that case, as in

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the case of *Long v. Mulford*, that the infant was not confined to that remedy but might resort in a proper case to a bill in equity to impeach the judgment. In the case of *Roberts v. Roberts*, 61 O. S., 96, a petition was filed in the court of common pleas of Crawford county to set aside a judgment of the probate court rendered during minority. The Supreme Court held that petition to be under the statute for a review of the regularity of the judgment, and not a bill in equity. We do not feel that we are called upon to determine whether the petition under consideration in the present case is one to review the regularity of the proceedings against the minor in the first case or a bill in equity to impeach the judgment.

We have considered the averments of the petition under both forms of procedure with the view of determining whether the facts are sufficient under either form of remedy.

The Supreme Court was at first uncertain as to the scope of inquiry under a bill of review. In some instances the pleadings including the depositions were considered, but it was finally held in the case of *Holman v. Riddle*, 8 O. S., 384, that:

“On bill of review in such case the court can only examine such matters as appear upon the record; the testimony before the jury in regard to the validity of the will, being oral and forming no part of the files or record, can not be reviewed.”

It is true that Section 11603, G. C., was adopted subsequent to the decision in *Holman v. Riddle*, but the provisions of Section 11603, were held in the case of *Carey v. Kemper, supra*, to be a statutory substitute for the prior practice in courts of equity requiring such reservation to be entered in the decree.

Paragraph 5, Section 11631, G. C., provides for vacation or modification of a judgment against an infant where the fact of infancy does not appear in the record. In proceedings under this paragraph the fact of infancy may be shown upon the record.

The theory of the law is that where the disability does not appear in the pleadings, the infant does not have the protection which the law requires and the special consideration which the court is accustomed to give in such cases.

Where the disability appears in the pleadings and the infant is represented as provided by statute, there is a presumption in favor of the regularity of the judgment.

It is claimed in the petition in the present case that there was no evidence offered. The record of the former case shows, however, that evidence was offered and considered by the court in the rendition of the judgment. We are bound by the recitals of this judgment so far as the petition in the present action may be considered as a bill of review. *Rankin v. Kemp*, 21 O. S., 651. See *Paulin v. Sparrow*, 91 O. S., 279. The case of *Sawitske v. Peters Machine & Manufacturing Co.*, 29 O. C. A., 515, involved fraud and unfairness by the defendant in procuring the judgment against the minor.

Upon full consideration we are of opinion that so far as the petition in this case may be regarded as a bill of review or proceedings in error, it is not sufficient as there is no error appearing upon the face of the record.

We now come to the second phase, to-wit, is the petition sufficient as a bill in equity to impeach the judgment?

There is no showing of fraud, collusion or unfairness in the proceedings leading up to the original judgment. In fact the petition negatives this idea because it avers that the present situation as to the plaintiff's injuries could not have been anticipated at the time of the original proceedings. There is no showing of collusion such as appeared in the case of *Long v. Mulford*. The next friend of plaintiff, who represented her in the original proceedings, is not claimed to have had any adverse interest or was otherwise disqualified to act in the capacity of next friend. We can not subscribe to the view expressed by counsel for plaintiff in error that the infant upon arriving at age had the rights of an adult who files a motion for a new trial within the statutory period. We think the infant is bound to show some equitable ground for the vacation of the original judgment. It will be noticed that Section 11603 does not preserve to the infant the right to file a motion for a new trial. The reservation is to show cause against the judgment.

In the case of *Johnson v. Pomeroy*, 31 O. S., 247, a judgment had been rendered against an insane person without the inter-

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vention of a trustee or guardian and in favor of one having knowledge of the insanity. It was held that such judgment was not void and "can not be impeached by the guardian of the judgment debtor without showing some fraud or unfairness on the part of the creditor in obtaining the judgment." In the absence of such a showing we think the petition in this case is not good as a bill in equity.

There is an averment in the petition of what is styled newly discovered evidence. Taking all of the averments of the petition we do not consider that the petition contains a sufficient statement of newly discovered evidence to justify the infant in opening up the judgment upon that ground. The sum and substance of the claim in this particular is that there have been developments of the injuries not anticipated at the time of the proceedings and judgment. Almost every case involving personal injury has an element of uncertainty as to the future. The court or jury trying the case consider the testimony upon this subject and determine the possibilities. If the fact as to injury turns out to be less or more than the jury estimates, such facts could hardly be relied upon in later years to overthrow the judgment. If the courts were to so hold it would give a great advantage to the infant. If the verdict and judgment were greater than the actual damages the infant could stand on the judgment and the other party would have no remedy, whereas if the verdict and judgment were less than the amount of damages as determined from the future then the infant would not be bound by the judgment but could open it up and recover the greater damages. This, we think, would be unfair to the opposite party and give the infant an advantage not contemplated by the law. Upon full consideration we are of opinion that the petition did not state a cause of action and that the judgment dismissing the petition was not erroneous.

Judgment affirmed.

FERNEDINE and KUNKLE, JJ., concur.

**AUTOMOBILE STRUCK BY TRACTION CAR AT A  
PRIVATE ROAD CROSSING.**

Court of Appeals for Pickaway County.

Allread, Ferneding and Kunkle, JJ., of the Second District sitting in  
the Fourth District by designation.

ROHR, ADMINISTRATOR, v. SCIOTO VALLEY TRACTION CO.

Decided, March 17, 1920.

*Negligence—Alterations Made after Accident not an Admission of Responsibility—No Implied Invitation to a Grade Crossing over a Private Road—Contributory Negligence of a Guest—Contributory Negligence Raised as an Inference though not Pleaded.*

1. Alterations or repairs to equipment, machinery and the like, made after an accident as a precaution against future accidents, are not admissible in evidence as an admission of responsibility for the past or that defendant had been negligent before the accident, or had knowledge of any defects.
2. In an action for negligence growing out of a grade-crossing accident, it is proper for the court to refuse to charge the jury that there exists a license or implied invitation for the public to use a crossing constructed and maintained by the traction company, where the road and crossing are private.
3. A passenger riding as guest of the driver of an automobile is required to exercise ordinary care for his own safety, therefore the court may properly refuse to give a special charge which ignores the question of contributory negligence on the part of such passenger.
4. Contributory negligence may arise as an inference from plaintiff's own evidence and be recognized as an issue in the case although not pleaded by defendant.

*Barton Walters*, for plaintiff in error.

*Oscar W. Newman and Charles Gerhardt*, for defendant in error.

**FERNEDING, J.**

Heard on error.

The administrator of Gertrude Perrill brought this action originally to recover damages for wrongful death.

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Decedent, it appears, was riding in the rear seat of an automobile owned by Kate Decker and driven by Harold Decker. The automobile contained the driver, Harold Decker, his father, Clifford Decker, both of whom occupied the front seat, and Kate Decker and the decedent, occupying the rear seat. The party were driving north from Circleville on the Columbus pike and turned to the east into what defendant claims to be a private road, but which plaintiff denies is a private road. This road crosses the tracks of the Scioto Valley Traction Company, and it was at this crossing the automobile was struck by a traction car of the defendant company running at a high rate of speed. The two women in the automobile were killed, one instantly, and the other died a short time thereafter as a result of the accident; Harold Decker, the driver, was severely injured, but recovered, and his father, Clifford Decker, although thrown a considerable distance by the collision, was practically uninjured. The case was tried to a jury, resulting in a verdict and judgment in favor of defendant. The assignments of error upon which counsel for plaintiff in error chiefly rely are:

1. Errors in ruling upon the admission and rejection of evidence.
2. Errors in refusing to limit the application of said evidence.
3. Errors in refusing to give certain charges requested by plaintiff before argument.
4. Weight of the evidence.

The plaintiff objected to the exclusion of certain evidence which related to the alleged changed conditions due to the relocation of certain poles. The witness, Charles Bell, was asked:

"Q. Now, Mr. Bell, what if anything, did you notice at that time and place with reference to any telephone poles or telegraph poles extending along the highway of the Scioto Valley Traction Company in a northerly direction?"

"A. Well, there was a string of poles out there; they had been changed since 1916."

"Q. What changes has been made in those poles since July, 1916?"

To have permitted him to answer would have been a violation of a well-known rule of evidence and incompetent. The court admitted the evidence so far as it related to the location of the poles at the time the accident occurred. This was the material question involved.

Subsequent alterations or repairs to equipment, machinery and the like, taken in precaution, to safeguard the future against accidents, are not to be accepted or construed as an admission of responsibility for the past; nor taken to mean that the defendant had been negligent before the accident happened, or had knowledge of such defects, if any existed.

To admit such testimony would tend to distract the mind of the jury from the real issue and create a prejudice against the defendant. It might also serve as a check upon remedying defects and discourage future improvements and betterments. *Bacon v. Noble*, 20 C. C., 281 (11 Circ. Dec., 49); *Columbia & Puget Sound Ry. v. Hawthorne*, 144 U. S., 202, and 29 Cyc., 616.

In the case at bar the record discloses it was not proposed to prove that such change in the relocation of poles was actually made by the defendant company, but by a telephone company which had poles constructed near by.

It is also contended that the trial court erred in admitting the testimony of Rev. E. A. Cush, Dr. Dunton and Vernon R. Stout, as to the declarations of Clifford Decker made shortly after the accident. We think a proper foundation was laid in the cross examination of Clifford Decker to warrant the admission of such testimony. The trial court was asked to instruct the jury that the testimony of Rev. Cush, Dr. Dunton and Mr. Stout should be limited to reflect upon the credibility of the witness, Clifford Decker. The trial court, we think, did not err in refusing to so limit such testimony. Had the court erred in not limiting such testimony at the time of its admission, it was the duty of counsel for plaintiff in error to have presented the matter to the trial court either in a request for a special charge before argument, or at the time of the general charge, in order to lay the foundation for error. This was not done.

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The court gave special charge No. 1 requested by plaintiff before argument as to the duties of the defendant in approaching the Fairview crossing. This charge sufficiently covered that question and the other special charges on that subject were properly rejected. *Limbaugh v. Western Ohio Ry.*, 94 Ohio St., 12 (113 N. E., 687).

Special charge No. 2 was as follows:

"An invitation to the public is implied to come upon the premises of the traction company, at proper places to do business with it, and a license or even an invitation may be implied where the company constructs, maintains and permits the use of a crossing not originally public under such circumstances that all persons who desire to use it may do so in the well-founded belief that it is a public crossing."

The court properly refused this charge, as the evidence disclosed that the roadway and crossing were not public, but private.

Counsel for plaintiff in error particularly complained of the refusal of the court to give special charges Nos. 6 and 7, which were as follows:

"Even though you should find that there was some act of negligence upon the part of the driver of the automobile. I charge you that Gertrude Perrill can not be held responsible for such nor can it be imputed to her if you further find that said automobile was the property of Kate Decker and that Gertrude Perrill at the time of the accident was simply riding in the same as the invited guest of Kate Decker."

"Notwithstanding the fact that you may find that the death of Gertrude Perrill resulted from the negligence of the traction company combined or concurring with negligence on the part of the driver of the automobile in which she was riding, the plaintiff would, nevertheless, be entitled to your verdict, if you find that the automobile was the property of Kate Decker and that Gertrude Perrill at the time of the accident was simply riding in the same as an invited guest."

We think both of these charges ignore the question of contributory negligence. In the case of *Toledo Railways & Light Co. v. Mayers*, 93 Ohio St., 304 (112 N. E., 1014), syllabus 2, it was held:

"Though plaintiff was required to exercise ordinary care for his own safety and to reasonably use his faculties of sight and hearing to observe and avoid the dangers incident to crossing such tract, an instruction that he 'was not exonerated from any duty at all by reason of the fact that he himself was not driving the machine,' is erroneous."

The contributory negligence of the deceased, it is claimed, was not made an issue by the pleadings. The failure of the defendant to plead contributory negligence is not conclusive. If contributory negligence arises as an inference from the plaintiff's own evidence it must be recognized as an issue in the case. In *Rayland Coal Co. v. McFadden*, 90 Ohio St., 183 (107 N. E., 330), it is held:

"In such case the issue of contributory negligence is not made by the pleadings, but is raised by the evidence properly offered by the parties in support of their respective claims as made in the pleadings. The issue of contributory negligence thus raised is to be determined by the same rules as to burden of proof and otherwise as if made by the pleadings."

We think such an inference may arise from the plaintiff's evidence and the court would not be justified in giving a charge which would ignore that inference. No prejudicial error is found in the general charge. The issues were fully stated and explained by the trial court and the instructions given covered the essential features of the case.

The evidence has been carefully considered and, without analyzing the same in detail we are of the opinion that the verdict and judgment are sustained by sufficient evidence.

Finding no prejudicial error, the judgment is affirmed.

ALLREAD and KUNKLE, JJ., concur.

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**ACCELERATION OF THE BOUNTY PROPOSED BY A TESTATOR.**

Court of Appeals for Hamilton County.

**FRANKLIN ALTER and GEORGE T. ALTER v. ROBERT S. ALTER ET AL.**

Decided, June 28, 1920.

*Wills—Vested Interests—Policy of the Law as to Time of Vesting—Bequest in the Form of a Direction to Pay—Acceleration of Bequest—Where Warranted by Unforeseen Exigencies and the Evident Intention of the Testator—Discretion of Trustees, Authorized to Hold, Manage and Reinvest—Authority of Trustees as to Reinvestment not Lost by Delay, When.*

1. A vested interest is one in which there is a present fixed right either of present enjoyment or future enjoyment.
2. The law favors the vesting of estates, and unless a condition precedent to vesting is clearly expressed, courts incline to that construction which treats interests given under the will as vested in the donee at the death of the testator.
3. A bequest in the form of a direction to pay or to pay and divide at a future period vests immediately, if the payment be postponed for the convenience of the estate, or to let in some other interest.
4. Where a testator gives an absolute and vested bequest, but provides for a postponement of the enjoyment thereof, and when an exigency, non-existent at the creation of the trust, arises, which is one not then anticipated by the testator, a court of equity may substitute another course of management of the trust fund in order to bring about a more complete realization of the purposed bounty. It may order an acceleration of the enjoyment of income or principal of the trust which neither expressly nor impliedly authorizes such a course to be taken. It is not the mere convenience or even the benefit of the beneficiaries which will move the court to hasten enjoyment of trust funds, but the necessity of varying the terms of the trust in order to give effect to the ultimate intention of its creator.
5. Where trustees under a will are authorized "to hold, manage, control and from time to time, as need be, re-invest," so long as the trustee acts in good faith, he is not subject to the control of the beneficiaries, nor of the courts in the reasonable exercise of the discretionary power conferred upon him.

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\* For opinion below see 22 N.P. (N.S.), #517.

6. A power given to trustees under a will to sell certain stocks three years after the death of testator is not lost by delay on the part of the trustees to exercise it pending an action to determine the existence and extent of such powers.

*Willis M. Kemper*, for George S. Alter.

*Rufus B. Smith*, for Franklin Alter.

*Pogue, Hoffheimer & Pogue*, for Robert S. Alter and Lucien W. W. S. Alter.

*James E. Robinson*, for Blanche Alter, Elizabeth T. Alter and Rebekah Alter.

*W. S. Little and J. L. Kohl*, for Walter B. Hofer et al, Trustees.

**SHOHL, P. J.**

This cause is heard here on appeal.

The action was brought under the provisions of Sections 10857 and 10858 of the General Code to obtain the direction of the court respecting the property to be administered under the trust created by the will of Franklin Alter, deceased.

The testator, a resident of Cincinnati, Hamilton county, Ohio, executed his will in August, 1909. He died in February, 1916, and the will was duly admitted to probate in March, 1916. It is a document of some twelve printed pages. The questions arise under Item VI, which disposes of the residue of the property. It is devised and dequeathed to the trustees herein in trust for a period of ten years from the date of the testator's death "to be held, managed, controlled and invested, and from time to time as need be reinvested by my said trustees for the period of ten years from and after my death (for the benefit and advantage of my eight children) namely Franklin Alter, George A. Alter, Henry T. Alter, Robert S. Alter, Lucien W. Alter, Blanche Alter, Elizabeth T. Alter, and Rebekah W. Alter." The trustees are directed to pay to each of said children \$2,500 per annum.

It is further provided: "Should the net income of my estate be more than sufficient to pay each of my said children the sum of \$2,500 per annum, such excess shall go in augmentation and become a part of the principal of my estate."

The will provides that in the event of the death of any particular child before or after the death of the testator (leaving issue),

the trustees shall pay annually to its issue per stirpes the portion of the parent. In the event of the death of any child leaving no issue, or leaving issue all dying before the period of final distribution, that part of the income which was to have been paid to such child shall go in augmentation and become a part of the principal of the estate.

The trustees are directed to sell and dispose of the stock in the American Tool Works Company of Cincinnati, Ohio, within one year after the testator's death, unless they shall unanimously agree to hold it for a period of three years "then and in that event, I direct that said stock be sold and disposed of at the end of the last mentioned period."

The will then provides: "At the end of ten years after the date of my death, I hereby authorize, direct and empower my trustees and executors, to convert my entire estate then remaining into money, except as hereinafter provided, and for that purpose I authorize and empower my trustees and executors to sell all my real estate then undisposed of and to convey the same by good and sufficient deeds to the purchaser or purchasers thereof. When my estate is so converted into money, I direct that my trustees and executors, after the payment of all costs and expenses incident to the administration of my estate (shall pay the same out) subject to the advancements made by me as hereinafter set forth, as follows:

One-eighth part thereof to my son Franklin Alter, and his heirs."

The other seven-eights are given to the other seven children by language identical to that with reference to Franklin Alter. One of the children, Henry T. Alter, predeceased his father. He was childless, unmarried and intestate.

The first cause of action in the petition asks instructions as to the following matters.

(a) Whether or not the estates created by Paragraph 6 of Item VI of said will to each of testator's children and their heirs is a vested estate, in fee simple in each of said children.

(b) Whether or not the estates so created by said paragraph 6 of Item VI of said will, for said children, can be mortgaged,

encumbered, sold, and transferred by said children; or passed by their wills.

(c) Whether or not said children may by instruments in writing duly executed transfer or assign their interest in the estates so given to them by said paragraph 6 of Item VI of said will, to take effect at once, and what form of instrument is necessary to effect said transfer and protect said trustees.

(d) Whether or not the now surviving children of said testator, each of them own absolutely and in fee simple, the one-seventh of the one-eighth of testator's estate given by testator to his son Henry T. Alter by said paragraph 6 of Item VI of said will.

(e) Whether or not said trustees now have the power under said will to sell the shares of stock owned by the estate in the American Tool Works Company of Ohio.

In the second cause of action the plaintiffs allege that at the time of the making of the said will, the income from the estate of the testator was not substantially more than sufficient to pay the eight children, then living, the sum of \$2,500 per annum each, but that since the making of the said will, especially since about one year before testator's death, his estate was greatly increased in value, so that at the time of his death and ever since, the income of the trust estate has been vastly more than sufficient to pay the sum of \$2,500 to each of his (now) seven children, the income being in excess of the sum of \$100,000 per annum.

By amendment to the amended petition it is further alleged that the plaintiff, Franklin Alter, is fifty years of age, George T. Alter is forty-nine years of age; that Franklin Alter was formerly in the Revenue Service of the United States Government, and that at about the time of the death of his father he was deprived of his said office and salary, and it has been impossible for him to find employment; that he has a wife and children to support, and he has no other income than said \$2,500 per annum, which, under present circumstances and conditions is wholly inadequate for the support of himself and his family. That George T. Alter is now afflicted with heart trouble, and in consequence thereof is unable to engage in any business or calling that will enable him

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to earn his own support; that he is required to support his daughter, and that under present circumstances and conditions, the sum of \$2,500 per annum is wholly inadequate for his needs.

The facts are not seriously in dispute. It is contended on behalf of the trustees that the testator's children do not take a vested interest, but that they have, in the language of *Holt v. Lamb*, 17 O. S., 374, 387, an equitable right to have the property sold. Applying this doctrine, they maintain that the will in question creates gifts contingent upon their surviving the ten year period. They cite *Barr v. Denney*, 79 O. S., 358, and the cases therein referred to. A vested interest is one in which there is a present fixed right either of present enjoyment or of future enjoyment. Page on Wills, Section 656.

What, then, was the intention of the testator as evidenced by the language of the entire will? Undoubtedly the law favors the vesting of estates and unless a condition precedent to vesting is clearly expressed, courts incline to that construction which treats interests given under the will as vested in the donee at the death of the testator. See *Bolton v. Bank*, 50 O. S., 290; *Linton v. Laycock*, 33 O. S., 128; *Brasher v. Marsh*, 15 O. S., 103.

It will be noted that the testator has directed the division of an estate among specified persons, only by a direction to divide and pay. A bequest in the form of a direction to pay or to pay and divide at a future period vests immediately, if the payment be postponed for the convenience of the estate, or to let in some other interest. Hawkins on Wills, 232. The whole subject is treated in the note in L. R. A., 1918 E., page 1097.

It appears from the entire will, however, that the testator intended that each of his children was to be the owner of one-eighth of his residuary estate, even though he stipulated that for ten years the management should be withheld from them, and he further desired to restrict their enjoyment of it during that period. Unlike the case of *Barr v. Denney, supra*, the distribution is to beneficiaries now known. In the event that all of his children should have died during the ten year period, there is no disposition of the estate by the testator. If their gifts are contingent, and the conditions not fulfilled, the construction contended

for on behalf of the trustees would make possible an intestacy as to the residuary estate. We hold that the will gives each of the surviving children a vested equitable interest. This conclusion disposes of the first four questions propounded. It is, however, only preliminary to the consideration of the application to increase the allowances of \$2,500 to each of the children as the claim of plaintiffs is based upon the absolute ownership of the share, the income of which it is now sought to anticipate.

The evidence shows that plaintiff, George T. Alter, is a man now fifty years of age. He is afflicted with heart trouble, which not only impairs his ability to earn a livelihood, but tends to increase his requirements. His condition is such that there is a possibility, if not a probability, that a delay in the enjoyment of his father's bounty may nullify the benefits to him of the gift itself.

The older brother, Franklin Alter, is now past fifty years of age, and has a family to support. In view of the increase in the cost of living, the amount provided by his father will not provide the kind or character of a livelihood which a testator, writing his will in 1909, would have contemplated as the result of a gift of that magnitude. In arriving at the intention of the testator the court should as far as possible try to put itself in the position of the testator at the time of making the will. *Jewett v. Jewett*, 21 C. C., 278. It appears from the will that Franklin Alter in his lifetime made advances to those of his children whose necessities required it.

A review of the authorities, many of which are set out in the note in 46 L.R.A.(N.S.), 43, leads us to conclude that where a testator gives an absolute and vested bequest, but provides for a postponement of the enjoyment thereof, and when an exigency, non-existent at the creation of the trust, arises, which is one not then anticipated by the testator, a court of equity may substitute another course of management of the trust fund, in order to bring about a more complete realization of the purposed bounty. It may order an acceleration of the enjoyment of income or principal of a trust which neither expressly or impliedly authorizes such a course to be taken. See *Bennett v. Nashville Trust*

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*Co.*, 127, Tenn., 126; *Pitts v. Rhode Island Hospital Trust Co.*, 21 R. I., 548; *Rhoades, Executor, v. Rhoades, et al.*, 43 Ill., 239; *Longworth v. Riggs*, 123 Ill., 208; *Knorr v. Millard*, 52 Mich., 542; *Curtiss v. Brown*, 29 Ill., 201.

It is not the mere convenience or even the benefit of the beneficiaries which will move the court to hasten enjoyment of trust funds, but the necessity of varying the terms of the trust in order to give effect to the ultimate intention of its creator.

In the case at bar the income which the estate is required to pay the beneficiaries is \$17,500 per year. The record shows that for the past four years the average annual income has been in excess of \$150,000. The principal is piling up, and belongs infeasibly to the children of the testator, who stand by and are unable to procure the wherewithal to meet their obligations, and to educate their children in accordance with the station of life which is now their proper expectancy. Indeed, as the interests of the children are vested, they might be subject to execution, and the refusal of the court to accelerate the enjoyment of the fund might result in loss of the fund in which no person has any interest but the legatees.

The court is of opinion that the case of George Alter presents a clear instance for the application of the doctrine set forth, and that the situation of Franklin Alter, while perhaps not so strong, likewise requires a similar order. The court will order an increase in the annual amounts directed under the will to be paid to each of them to \$6,000, subject to the further order of the court.

It will be noted that as to the share of each, no other person can by any possibility have any interest in the fund except those who are the "issue" of the children of the testator, and their interest is only a contingent interest in the income during the remainder of the ten year period. Our decision, therefore, can not prejudice any person who might be interested, nor lessen the interest of any parties in the estate in any way whatsoever. It does not increase the quantum of the inheritance of George or Franklin.

As to the other children of the testator, their present situation shows no reason for the interposition of a court of equity. The

trustees will be directed to charge the additional payment hereby ordered against the shares of George and Franklin respectively, so that on final distribution each of the brothers and sisters will get his full share with its accumulations.

Let us now take up the question as to whether the trustees now have power under the will to sell the shares of stock in the American Tool Works Company, now owned by the estate. It is urged that they no longer have the right to sell the stock.

At the time of the death of the testator, The American Tool Works Company was a corporation organized under the laws of West Virginia. Thereafter, in 1918, its directors caused a corporation of the same name to be incorporated under the laws of the state of Ohio. The property of the West Virginia corporation was transferred to the Ohio corporation and each of the stockholders thereupon received the same number of shares of the same par value in the Ohio corporation that they had previously held in the West Virginia Company. The assets of the corporations were identical. It is contended that this constitutes a sale and that the trustees have, by consenting to the foregoing, exercised and spent the power of sale given to them under the will.

It is apparent to the court sitting in equity that the change was one of form and not of substance, so far as constituting a sale was concerned. It was in effect the procuring of naturalization of the foreign corporation. The conduct of the trustees, in not taking action, while the question of their power to do so was being litigated in the courts, was not improper. The trustees are directed by the will to sell "at the end of" the three year period. The power granted to the trustees was monitory in its nature and is not defeated by the delay in its exercise shown by the facts in this case. See 2 Perry on Trusts, Section 490 and note 5.

It further appears that all of the beneficiaries desired that the stock now held by the trustees be not sold. They all join in urging that no sale be made. They contend that by their conduct they have now estopped themselves from calling the trustees to account, if the trustees should comply with their request, and that therefore the trustees should be required to carry out their

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wishes since they now incur no liability thereby. It is not necessary for this court to determine whether the trustees would be protected if they should acquiesce in the position of the legatees and carry out their request. The sole question upon which the direction of the court is asked, is, whether the trustees now have the power to sell.

In addition to the specific direction to sell the stock of the American Tool Works Company, the will authorizes the trustees to "hold, manage, control, and, from time to time, as need be, reinvest." So long as a trustee acts in good faith he is not subject to the control of the beneficiaries, nor of the courts in the reasonable exercise of the discretionary power conferred upon him. See 2 Perry on Trusts, Section 509; also note 8 L.R.A.(N.S.), 398.

The court, therefore, will not enjoin the trustees from making sale of the stock of the American Tool Works Company.

A decree may be drawn embodying the foregoing.

HAMILTON and CUSHING, J. J., concur.

**TITLE NOT PASSED BY DELIVERY TO CARRIER  
UNDER CONSIGNMENT.**

Court of Appeals for Shelby County.

**MOTCH & MERRYWEATHER MACHINE CO. v. SIDNEY MACHINE  
TOOL CO.**

Decided, December 12, 1919.

1. A manufacturer at Sidney, Ohio, ordered machinery "Net f. o. b. cars at Cincinnati, Ohio, delivered October." The order was accepted "f. o. b. Oakley (Cincinnati), delivery October, terms, draft attached to B. L." The modified terms were acquiesced in. The machinery was delivered to the carrier at Cincinnati, October 31, consigned to the order of the seller with directions to notify the purchaser. The bill of lading was forwarded to the seller at Cleveland, Ohio, who, on November 4 forwarded the same, with draft attached, to a collecting bank in Sidney. The shipment and payment of the draft were refused. *Held*, the delivery was not made in October as per contract and the purchaser was not bound to accept delivery.
2. Delivery to a carrier under a consignment to the seller (the bill of lading being forwarded to a collecting bank) does not pass title to the purchaser at the time of delivery to the carrier, but the title is thereby reserved to the seller until actual tender or delivery of the machinery to the purchaser.

*Wicoff & Timmons and Wilkin, Cross & Daust*, for plaintiff in error.

*P. R. Taylor*, for defendant in error.

**ALLREAD, J.**

Heard of error.

The original action was brought to recover the purchase price of certain machinery claimed to have been sold by the plaintiff in error to the defendant in error. The answer, among other

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\* Motion to require the Court of Appeals to certify its record in this case overruled in the Supreme Court, March 2, 1920.

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things, denies that the property was delivered according to contract.

From the record it appears that the machinery in question was ordered upon open account "Net f. o. b. cars at Cincinnati, Ohio. Delivery October." There is a statement in the order showing that the time of delivery was important. The order was accepted by plaintiff in error subject to the following: "F. O. B. Oakley, delivery October, terms, draft attached to B. L." The added terms were inferentially accepted by defendant in error.

It also appears that the goods were shipped on October 31 from the Cincinnati Planer Company, Oakley, Cincinnati, Ohio, consigned to the order of the plaintiff in error, with direction to notify the defendant in error. The bill of lading was evidently forwarded from Cincinnati to the plaintiff in error at Cleveland, Ohio.

On November 4 the plaintiff in error wrote the defendant in error that the shipment had been made as above stated, and that the bill of lading, duly indorsed, together with a sight draft, had been forwarded by the plaintiff in error to the First National Bank of Sidney for collection.

On November 7 the defendant in error by letter notified the plaintiff in error that the shipment had arrived in Sidney and awaited unloading by the defendant in error, which the defendant in error was prepared to do on the basis outlined in the letter. The substance of the letter was that the defendant would accept the shipment if the terms were changed from a sight draft to a credit of thirty days. This credit was denied by the plaintiff in error, and the defendant in error thereupon canceled the order and refused acceptance of the goods.

The first question for determination is whether there was a delivery within the month of October; the second, whether the delivery as made was accepted by the defendant in error.

It is claimed by counsel for plaintiff in error that delivery was made under the provisions of the sales act (99 O. L., 413) when the goods were delivered to the carrier at Oakley, Cincinnati, on October 31.

The defendant in error contends that the delivery to the carrier on October 31, was not a delivery to the defendant in error, and that the goods were for the first time tendered for delivery when the same reached Sidney some days later, and when the bill of lading and draft were presented by the Sidney bank.

The important feature of this transaction is the consignment under a bill of lading to the order of the plaintiff in error instead of to the order of the defendant in error.

The effect of delivery to a carrier under a bill of lading is defined by paragraphs 2 and 3, Sec. 8400, G. C., as follows:

"(2) When goods are shipped, and by the bill of lading they are deliverable to the seller or his agent, or to the order of the seller or of his agent, the seller thereby reserves the property in the goods. But if, except for the form of the bill of lading, the property would have passed to the buyer on shipment of the goods, the seller's property in the goods shall be deemed to be only for the purpose of securing performance by the buyer of his obligations under the contract.

"(3) When goods are shipped, and by the bill of lading the goods are deliverable to the order of the buyer or of his agent, but possession of the bill of lading is retained by the seller or his agent, the seller thereby reserves a right to the possession of the goods, as against the buyer."

By the first sentence of paragraph 2 the transaction in question would have the effect of reserving the property in the goods to the seller.

The second sentence of paragraph 2 is designed to relieve against the mere form of the bill of lading, where the real intention was to transfer title subject only to the performance of certain conditions, such as payment, etc.

We think, however, that provision does not apply for the reason that the transaction here does not have the effect of passing title. The seller did not surrender control of the bill of lading at the time of the shipment. The bill of lading was evidently sent from Cincinnati to the seller at Cleveland and was in the possession and control of the seller on November 4. On that date the bill of lading with sight draft was mailed to

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a collecting bank at Sidney. This bank was the agent of the plaintiff. The bill of lading and sight draft arrived at Sidney on November 7. Up to that date the bill of lading was in the control of the seller. In order that the transaction itself should pass the title to the buyer it should appear that the seller had surrendered control of the property.

By paragraph 2 above quoted the retention of the bill of lading even where the shipment is to the order of the buyer is a reservation of the right of possession. For a stronger reason the retention of the bill of lading would be a reservation of the right of possession where the seller also makes the shipment to his own order. We are, therefore, of opinion that the second sentence of paragraph 2 above quoted does not apply to the case at bar and that under the first sentence of paragraph 2 the seller reserved title to the property shipped.

We are confirmed in this view by the case of *Petersburg Fire Brick & Tile Co. v. American Clay Machinery Co.*, 89 Ohio St., 365 (106 N. E., 33). The facts in the *Brick Company case* were somewhat similar to those in the case at bar. In the opinion this significant statement is found, at page 373:

"This merchandise was not delivered f. o. b. cars at Bucyrus, or Willoughby, or factory where made, for shipment to the brick company at Coal Grove, but was delivered to the common carrier for shipment to the machinery company at Coal Grove. The delivery to the common carrier was not actual or constructive delivery to the purchaser. There was no time in the history of this transaction when the machinery company parted with the possession or right of possession of this machinery, nor was there a time when the brick company had a right to demand or require the common carrier to deliver this machinery to it."

Likewise, it may be said that the machinery in the case at bar was not delivered to the common carrier at Cincinnati, Ohio, for delivery to The Sidney Machine Tool Company; but the delivery was to the common carrier for shipment to the plaintiff in error. The delivery to the common carrier was not actual or constructive delivery to the purchaser. There was, within the stipulated period, no delivery, actual or constructive,

to the defendant in error. When a delivery was actually tendered subsequently to the month of October the said machine tool company had the right to reject the same.

We think the letter of The Sidney Machine Tool Company of November 7 was not an acceptance of the machinery, but was an offer to accept the same upon certain conditions. When the plaintiff in error rejected the conditions The Sidney Machine Tool Company had the right to unqualifiedly reject the machinery, and this we think it did by its telegram of November 14.

It therefore follows, first, that there was no delivery, actual or constructive, to The Sidney Machine Tool Company within the stipulated period; second, The Sidney Machine Tool Company did not accept, but on the contrary rejected the subsequent delivery of the machinery. The court of common pleas did not err in holding for the defendant.

FERNEDING and KUNKLE, JJ., concur.

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**PROCEEDING TO ENFORCE STOCKHOLDERS LIABILITY.**

Court of Appeals for Hamilton County.

**THE CINCINNATI & COLUMBUS TRACTION CO. v. THE UNION SAVINGS BANK & TRUST CO. \***

Decided, April 22, 1918.

*Corporations—Suit to Collect Unpaid Stock Subscriptions—Not a Chancery Case and Not Appealable—Jurisdiction of Court of Appeals...*  
An action to collect unpaid subscriptions to the capital stock of a corporation is not a chancery case within the meaning of Section 6, Article IV of the Ohio Constitution, and is not appealable.

*D. W. Murphy and Thos. L. Michie, for appellant.*

*Murray Seasongood and Robert P. Goldman, for appellees.*

*J. Schroder, for A. G. Schwab, and John C. Healy, for Virginia R. Burch.*

**BY THE COURT.**

Heard on motion to dismiss appeal.

The original proceeding in this case was an action for the appointment of a receiver, marshaling of liens and the foreclosure of a mortgage. A cross petition was filed on behalf of Daniel W. Murphy, administrator of the estate of Otto Smith, deceased, setting up a judgment obtained against the Cincinnati & Columbus Traction Company for wrongful death and seeking to secure payment of balances due on subscriptions for stock made by numerous stockholders of said traction company. An order had been made in this case directing the receiver to proceed to the collection of any balances that might be due upon said stock subscriptions.

The court of common pleas sustained the demurrers to the amended supplemental cross-petition of said Daniel W. Murphy,

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\* For subsequent opinion in on another branch of the same litigation, see *Cincinnati & Columbus Traction Co. v. Union Savings Bank & Trust Company, post.*

administrator, and, said cross-petitioner having elected to stand on the averments of said amended supplemental cross-petition, and declining further to amend or plead, a judgment was entered dismissing such amended supplemental cross-petition at the cost of said cross-petitioner. To this judgment notice of appeal was given by said Murphy, administrator, and proceedings taken to perfect an appeal in this court.

The case coming on to be heard in this court a motion to dismiss the appeal for want of jurisdiction is filed.

The jurisdiction in appeal, of the court of appeals, is fixed by Section 6, Article IV of the amended Constitution, which gives the right of appeal only in chancery cases. The case of *Wagner v. Armstrong et al*, 93 Ohio St., 443, has discussed and defined this right.

An action to collect an unpaid subscription to capital stock of a corporation is a suit at law to recover a money judgment. (*Smith, Recr., v. Johnson et al*, 57 Ohio St., 486.)

"A court of equity has no jurisdiction, on the ground of avoiding a multiplicity of actions at law, of an action against a corporation which has been adjudicated a bankrupt, to enforce collection of unpaid subscriptions by stockholders of such corporation, as the liability of each stockholder presents a separate controversy unconnected with that of any other." *Kelley, Trustee, v. Gill*, 62 L. Ed., 185 (245 U. S., 116). See also *Hale v. Allison*, 188 U. S., 56.

The cross-petition upon which appeal is sought does not raise a chancery question, and the court is therefore without jurisdiction.

The motion to dismiss the appeal is granted.

JONES, P. J., and HAMILTON, J., concur.

WILSON, J., not participating.

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**NUNC PRO TUNC ENTRY CAN NOT SUPPLY PLACE OF ONE  
NEVER MADE OR ORDERED MADE.**

Court of Appeals for Hamilton County.

CATHERINE REYNOLDS v. GEORGE J. REYNOLDS.

Decided, November 3, 1919.

*Service of Notice of Hearing of Motion and Return Thereon—When Authority of Attorney to Bind Client Ends—Necessity of Action of a Court being Indicated by the Record.*

1. When notice of the hearing of a motion is required the form, substance, service and return of service on such notice are prescribed in Sections 11372 and 11374 of the General Code. Compliance with the provisions of these sections is necessary to give the court jurisdiction to bind the parties to the action.
2. The authority of an attorney of record employed in a divorce case to act for, receive service of notice and to bind his client, ends on the entering of judgment. That part of the judgment awarding the custody of minor children and fixing periodical payments for their support until the further order of court does not change the rule as to the ending of the attorney's employment.
3. When a court must act itself and act directly, that act must be evidenced by the record. After the term, a court may not, by an order entered *nunc pro tunc*, enter of record an order that it might have made or intended to make, but which in fact was not made, attempted or directed to be made.

*W. F. Fox, for plaintiff in error.**Frank & Franks, contra.*

CUSHING, J.

This cause is heard on error. The facts are:

October 21, 1916, Catherine Reynolds filed an action for divorce against George J. Reynolds. October 30, 1916, Reynolds filed an answer and cross petition, had summons served and asked for divorce from Catherine Reynolds. April 23, 1917, a divorce was granted George J. Reynolds. The custody of the minor children was given to Mrs. Reynolds. He was

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ordered to pay \$10 a week for their support. November 20, 1918, a motion was made to modify that order. December 2, 1918, the following entry was made:

"This cause coming on the 30th day of November, 1918, to be heard on the motion filed herein by defendant on the 20th day of November, 1918, to modify and discontinue the payment of money for the maintenance of the minor children of the parties hereto, for the reason that said children are now self-supporting and are not dependent upon defendant for their maintenance, and the evidence, and plaintiff's attorney of record having been notified a reasonable time before the hearing, to-wit: on the 20th day of November, 1918, and in appearing in open court and in disclaiming authority, the court, on consideration thereof, does hereby grant said motion, and hereby orders, adjudges and decrees that payment of money for the maintenance of the minor children of the parties hereto be discontinued immediately, for the reason that said children are self-supporting and are not dependent upon defendant for their maintenance."

December 31, 1918, the following order was made:

"This cause coming on to be heard on the motion filed herein by defendant on the 21st day of November, 1917, for an order to modify the original decree entered herein on the 23rd day of April, 1917, in so far as the maintenance of the minor children of defendant were concerned, and to reduce said amount from Ten (\$10.00) Dollars per week to Three (\$3.00) Dollars per week, and the evidence, the parties herein having been duly and legally served with notice of the filing of said motion and the date of the hearing thereof, and appearing in open court with counsel, the court, on consideration thereof, hereby modifies its original order of Ten (\$10.00) Dollars per week, and hereby orders defendant to pay into this court for the maintenance of his said minor children the sum of Seven and 50/100 (\$7.50) Dollars per week until further order of the court, and hereby makes this entry *nunc pro tunc* as of January 25th, 1918, the date of the hearing of said motion and of the judgment and order of the court. To all of which plaintiff excepts."

Two questions are presented by the record. First. The kind and service of notice on Catherine Reynolds as to the hearing of December 2, 1918. The entry recites that "plaintiff's at-

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torney, of record, having been notified a reasonable time before the hearing, to-wit on the 20th day of November, 1918, etc." The record does not disclose the form of notice or by whom served. The transcript of the docket and journal entries recites that the attorney disclaimed authority to represent Catherine Reynolds. Section 11372 provides that such notices must be in writing, contain the names of the parties, the place where and the day on which it will be heard and the nature and terms of the order applied for. The notice required by the statute was not served.

The record shows and it is admitted in argument that there was no service on the plaintiff other than the notice given to William F. Fox, who had been her attorney in the original action, in which the judgment of April 23, 1917, was rendered. There is no presumption that the lawyer who had represented her up to the time of the judgment was authorized to receive summons for her at the time of the motion to modify the original decree and the subsequent notice. The authority of an attorney ordinarily ends with the rendition of a final judgment or decree. See 2 Mechem on Agency (2 ed.), Sec. 2315; Weeks on Attorneys (2 ed.), Sec. 218; 3 A. & E. Encyl. of Law (2 ed.), 329; 4 Cyc., 952.

In the case at bar, after the judgment was rendered, the defendant was to pay the money into court and plaintiff's attorney had no further duties to perform. Even apart from his disclaimer of authority to represent plaintiff, defendant was chargeable with knowledge that he was without authority to receive summons for her. *Kalmanowitz v. Kalmanowitz*, 108 App. Div. N. Y., 296; *Conklin v. Conklin*, 113 App. Div. N. Y., 743.

As the notice to the opposite party to vacate a judgment at a subsequent term is jurisdictional, an order without notice to the other party is void. The attorney for plaintiff could not bind her by an unauthorized appearance at a term subsequent to the rendition of final judgment. *Owen v. Smith*, 155 Ia. 463, 136 N. W., 114; *Scott v. Scott*, 174 Ia., 740, 156 N. W., 834; and *Berthold v. Fox*, 21 Minn., 51. See also *Nye v. Stillwell*, 12 C. C., 40; 5 Circ. Dec., 35.

The power of an attorney to represent a party is fully executed by the accomplishment of its purpose when a judgment is obtained. The authority given by the appointment ends when nothing remains to be done in pursuance of it. The notice therefore served upon Mr. Fox did not constitute notice to plaintiff. The order based thereon was void.

January 25, 1918, the court heard a motion to modify its former order allowing \$10.00 per week for the support of the minor children. On that day the court mailed ecounsel a memorandum that the amount would be \$7.50 per week. The clerk was not directed under Section 1641, General Code, to enter the order on the journal, nor was the court's memorandum filed with the clerk. There was no record made, directed or instructed to be made at that time, nor during that term of court.

December 31, 1918, after three terms of court had expired, an order *nunc pro tunc* was made as of January 25, 1918. The question presented is: May a court enter an order *nunc pro tunc* to take the place of one it might have intended to make, but which was not made nor ordered?

This court in the case of *Shober v. The State* quoted with approval *Bullitt County v. Washer*, 130 U. S., 132, 149, as follows:

"The well settled maxim that a court of record can act only through its orders made of record, when applied to judicial proceedings, means that where the court must act itself, and act directly, that action must always be evidenced by the record."

The rule as to orders *nunc pro tunc* is well stated in *Gardner v. People*, 100 Ill. App., 254, 257:

"Courts can, by *nunc pro tunc* orders, supply omissions in the record of what was actually done in the cause at a former time, and by mistake or neglect of the clerk was not entered in the clerk's minutes or the court's records; but when the court has failed to make an order which it could have made and in fact intended to make it can not subsequently make the same *nunc pro tunc* so as to make it binding on the parties to the

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suit from the date it was intended to have been so entered." See also *Cleveland Leader Printing Co. v. Green*, 52 O. S., 487.

The written memorandum of the court was no part of the record in the case. *State, ex rel., v. Hoffman*, 95 O. S., 149.

For the errors stated the cause will be reversed.

SHOHL, P. J., and HAMILTON, J., concur.

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#### HABEAS CORPUS FOR RELEASE OF ONE CONVICTED OF HOMICIDE.

Court of Appeals for Franklin County.

PRESTON E. THOMAS, WARDEN, ETC., v. WILLIAM HARRISON  
COWDREY.

Decided, March 8, 1920.

*Habeas Corpus—Judgment Discharging a Prisoner Reviewable—Writ Will be Granted only Where Prisoner is Held under a Void Judgment—Sentence for Murder in the Second Degree by Administration of Poison not Open to Collateral Attack.*

1. A judgment of the court of common pleas in a habeas corpus case discharging the petitioner, is reviewable by the court of appeals in a proceeding in error.
2. A writ of habeas corpus will not be allowed in a case where the petitioner is held under a judgment which is merely voidable. Habeas corpus is an appropriate remedy only in cases where the judgment is void.
3. Where an indictment charges murder in the first degree by the administration of poison and a verdict of murder in the second degree is returned by the jury and sentence is imposed by the court thereon, such verdict and sentence are not void and can not be collaterally attacked in a habeas corpus proceeding.

*John G. Price, Attorney General; Isaac C. Baker, Prosecuting Attorney of Butler county; and Ben A. Bickley, Special counsel, for plaintiff in error.*

*James C. Nicholson, contra.*

**KUNKLE, J.**

This is an action in habeas corpus. Defendant in error, William Harrison Cowdrey, seeks to obtain his release from the Ohio Penitentiary. The habeas corpus proceeding was brought in this county. Defendant in error, Cowdrey, was indicted in Butler County, Ohio, and charged with murder in the first degree. The indictment was in three counts and charged murder in the first degree by the administration of poison.

Defendant in error was convicted of murder in the second degree under the third count of the indictment and was sentenced to life imprisonment in the Ohio Penitentiary.

The third count of the indictment charged that the defendant:

"Did unlawfully, purposely and of deliberate and premeditated malice with the intent one Lorel Wardlow unlawfully, purposely and of deliberate and premeditated malice and by means of poison to kill and murder did give and administer etc.

\* \* \* a large quantity of poison called arsenic, etc., which arsenic was put in water" etc., etc.

After being convicted by a jury in the Butler county court of common pleas defendant in error Cowdrey, filed a motion in such court asking for his discharge and also a motion for a new trial.

Both motions were overruled and as above stated defendant in error was sentenced to the Ohio Penitentiary for life.

It was admitted by counsel in the argument of this case that the judgment of the lower court upon such motions was affirmed by the court of appeals of Butler county; that no bill of exceptions was filed in such court and that the Supreme Court refused a motion for leave to file a petition in error.

The court of common pleas of Franklin county sustained the petition in habeas corpus and ordered defendant in error discharged from the Ohio Penitentiary.

A petition in error has been filed in this court for the purpose of reviewing such judgment and the order discharging defendant in error from the Ohio Penitentiary has been suspended pending the hearing and determination of this proceeding in error.

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A motion has been filed in this court to quash the proceedings in error upon the ground that this court has no jurisdiction to review a judgment of the court of common pleas in a habeas corpus proceeding.

It has been held in the case of *Henderson v. James, Warden*, 52 O. S., 242, that a judgment of the court of Common Pleas in a habeas corpus proceeding is reviewable on error and we think such judgment is also clearly reviewable under Section 6, Article 4 of the Constitution as amended in 1912.

The motion to quash will, therefore, be overruled.

The next question for consideration relates to the jurisdiction of the common pleas court of Franklin county, Ohio, in the habeas corpus proceeding.

It is clearly settled in this state that the writ of habeas corpus can not be made a substitute for a proceeding in error.

In the case of *Ex parte Stephen M. Shaw*, 7 O. S., 81, the first paragraph of the syllabus is as follows:

"A habeas corpus can not be used as a summary process to review or revise errors or irregularities in the sentence of a court of competent jurisdiction. Imprisonment under a sentence can not be unlawful, unless the sentence is an absolute nullity. If clearly unauthorized and void, relief from imprisonment may be obtained by habeas corpus; if voidable, a writ of error is the appropriate remedy." See also *Ex parte Joseph Vanhagan*, 25 O. S., 426.

In the case of *In re George Winslow*, 91 O. S., 328, the court says:

"If the court in sentencing him did not act under this statute, but sentenced him under another statute, which for the purpose of this case may be conceded to have been invalid, the sentence was erroneous and voidable but not void. The error was not a jurisdictional one and it can not be reviewed in a proceeding in habeas corpus." See also 91 O. S., 315; 94 O. S., 110; 96 O. S., 519; 25 O. C. C. (N. S.), 388; 80 O. S., 402.

From a consideration of the authorities cited we are of opinion that where the complainant is detained under a sentence which has been imposed by a court that a writ of habeas corpus

can not be allowed unless there is an absolute want of jurisdiction upon the part of the court imposing such sentence.

For errors or irregularities which may have occurred in the proceedings, in a court having jurisdiction, the law provides a remedy for the correction of such errors or irregularities by a proceeding in error and not by habeas corpus.

Where error is prosecuted from the judgment of the lower court the reviewing court may set aside the conviction in a proper case and remand the case for new trial or for a new sentence.

In a habeas corpus case if the writ is allowed the necessary result would be to discharge the accused.

The courts, particularly in our own state, have, therefore, strictly limited the jurisdiction in a habeas corpus case so as to prevent an improper application of the writ in cases where the accused should be retained for a new trial or to be resentenced, instead of being discharged.

In the case at bar it is conceded that the court of common pleas of Butler county had jurisdiction of the person of the defendant in error and that there was a valid indictment against defendant in error of murder in the first degree.

This conferred upon the court of common pleas of Butler county jurisdiction of the subject matter involved in the indictment.

It is claimed by counsel for defendant in error that the indictment upon which Cowdrey was tried and convicted gave the Butler county court of common pleas no jurisdiction except to convict or acquit the defendant in error of murder in the first degree and that the verdict of murder in the second degree and the judgment and sentence thereon, of the court of common pleas of Butler county, were not merely voidable but were absolutely void.

The indictment was based upon Section 12400 of the Code which provides as follows:

"Whoever, purposely and either of deliberate and premeditated malice, or by means of poison, or in perpetrating or attempting to perpetrate rape, arson, robbery or burglary, kills another is guilty of murder in the first degree," etc.

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Section 12403, G. C., provides that:

"Whoever, purposely and maliciously kills another, except in the manner described in the next three preceding sections, is guilty of murder in the second degree and shall be imprisoned in the penitentiary during life."

Section 13692, among other things provides that:

"When the indictment charges an offense including different degrees, the jury may find the defendant not guilty of the degree charged and guilty of an inferior degree thereof. If the offense charged is murder, and the accused is convicted by confession in open court, the court shall examine the witnesses, determine the degree of the crime, and pronounce sentence accordingly."

Section 13583 provides that:

"In an indictment for murder in the second degree or manslaughter, the manner in which, or the means by which the death was caused need not be set forth. It shall be sufficient in an indictment for murder in the second degree to charge that the defendant did purposely and maliciously, and for manslaughter that the defendant did unlawfully, kill the deceased."

In the case of *Robbins v. State*, 8 Ohio State Reports, page 131 in the last paragraph of the syllabus it is held that:

"The statute having required that, '*in all trials for murder*,' the jury shall, if they find the defendant guilty, ascertain from the evidence before them the degree of the homicide, it is error for the court to instruct the jury, on the trial of an indictment for murder in the first degree *by means of poison*, that, in this kind of a case, murder is not of different degrees, and that, therefore, if they find the defendant guilty as he stands charged in the indictment, they must return a verdict for murder in the first degree."

This decision was rendered by a divided court, but it has never been overruled nor modified by any subsequent decision of our Supreme Court.

In some jurisdictions this decision has been criticised and disapproved and in others it has been followed.

Counsel for defendant in error claims that our statutes have been materially changed since the decision in the Robbins case.

At the time of the decision of our Supreme Court in the Robbins case the statute providing for a conviction upon included offenses applied to trials in murder cases.

The statute was subsequently amended so as to apply to all cases of included offenses.

We do not think this amendment changed the effect of the law as to murder cases.

The Robbins case was approved in the case of *Adams v. State*, 29 O. S., 412, and it was there held that:

"Under Section 39 of the crimes act, it is within the lawful province of the jury, in all crimes for murder, to determine the grade of the crime."

The case of *Lindsey v. State*, 69 O. S., 215, was a case wherein the defendant was indicted for murder in attempting to commit a robbery and it was held in the third paragraph of the syllabus that:

"An indictment, which charges, in proper form, an attempt to commit robbery, and then avers that the defendant, with others, in such attempt, did unlawfully and purposely, by means of a revolver loaded with gunpowder and a leaden bullet, shoot the deceased, with intent to unlawfully and purposely kill and murder him, and did, by means of the shooting, strike, penetrate, and wound him, with intent unlawfully and purposely to kill and murder him, thereby giving him a mortal wound from which he instantly died, and that by these means, they did unlawfully, purposely, and in an attempt to perpetrate a robbery, kill and murder the deceased, sufficiently charges murder in the second degree, although the word malice is not employed in the indictment in describing the act."

In a collateral proceeding of habeas corpus, jurisdiction is determined from the scope of the indictment in the original case. We do not have the evidence taken in the trial in the Butler county case before us nor do we know from the record what occurred in the trial of that case. We do know, however, that a sufficient indictment was returned against the defend-

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ant in error in Butler county, Ohio, for murder in the first degree and that he was convicted and sentenced in Butler county, Ohio, for murder in the second degree.

Various cases have been cited which involve the charge of the trial court upon the evidence in cases involving murder by poison and also in cases involving murder in the perpetration of robbery.

We think the case at bar is distinguishable from cases where the trial court, hearing the evidence, is required to submit an appropriate charge upon the evidence which has been introduced.

We have not been referred to any case where a verdict of murder in the second degree under an indictment similar to the one under consideration has been held to be a nullity.

The case of *Dresbach v. State*, 38 O. S., 365, is relied upon by counsel for defendant in error. In this case it is held that:

"On the trial of an indictment for murder in the first degree, charging the accused with purposely killing another by administering poison, the evidence tending to show no other grade of offense, it is error to charge the jury to the effect that if they find the accused guilty their duty will be fulfilled by convicting of murder in the first or second degree, or manslaughter. And where the verdict is returned for a lower grade of homicide than murder in the first degree, a new trial should be granted, where it appears from the evidence that a verdict of acquittal might have been rendered had the jury been properly instructed."

The Dresbach case involved the irregularity of the trial.

There was a conviction of murder in the second degree in the Dresbach case and in the syllabus and also in the opinion of that case it is clearly held that the verdict of murder in the second degree was ground for a new trial.

In order to sustain the contention of counsel for defendant in error the court in the Dresbach case should have held that the verdict of murder in the second degree was a nullity and should have discharged the defendant. We think the fact that the court in the Dresbach case ordered a new trial is a sufficient answer to the claim of counsel for defendant in error that such verdict and sentence thereon were null and void.

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The case of *State v. Shafer*, 96 O. S., 215, is a case which arose upon the evidence. The court held that where the death of the party struck by the automobile was instantaneous there was no element of assault and battery.

On page 228 of this decision, the Lindsey case above referred to, is mentioned but the same is not disapproved or even criticised insofar as different degrees of murder are concerned.

We have carefully examined the authorities cited in the very exhaustive briefs which have been filed by counsel but will not attempt to discuss or review such authorities in detail.

It should be noted, that error was prosecuted to the court of appeals of Butler county from the conviction and sentence of the common pleas court of Butler county.

The judgment of the court of common pleas was affirmed by the court of appeals.

An application to file a petition in error seeking the reversal of the judgment of the court of appeals of Butler county was presented to the supreme court and such application was rejected.

The fact that the supreme court refused leave to file a petition in error from the judgment of affirmance of the original case is some indication of the views of the supreme court upon the validity of the sentence in question.

From a careful consideration of all the authorities cited by counsel we are of opinion that the verdict of murder in the second degree and the sentence thereon were not absolutely void, and therefore that a writ of habeas corpus should not be allowed.

The judgment of the court of common pleas of Franklin county will be reversed, and final judgment will be rendered in favor of plaintiff in error.

ALLREAD and FERNEDING, JJ., concurring.

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**WHEN A STATUTE MAY BE REGARDED AS REPEALED  
BY IMPLICATION.**

Court of Appeals for Stark County.

COTT-MOHRMAN CO. v. MASSILLION FOUNDRY & MACHINE CO.  
ET AL.\*

Decided, October 27, 1919.

*Repeals—Acts Must be Harmonized if that can be Done by a Reasonable Construction—Mechanics Liens—Must be Filed Within Sixty Days.*

1. Repeals by implication are not favored, and in the absence of an express repeal, the courts will not consider former legislation as repealed by implication where the former and later acts may be harmonized by a reasonable construction so as to continue both in operation; but a subsequent act revising the whole subject-matter of the former act and evidently intended as a substitute for it although it contains no express words to that effect, operates as a repeal of the former act.
2. The mechanic's lien law, as found in 103 O. L., 369-379, and amended and supplemented in 106 O. L., 522-534, is the exclusive method by which a mechanic's lien may be secured against a private individual, firm or corporation, and the same must be filed within sixty days, as provided therein.

*Floyd & Yutsey, for plaintiff in error.*

*Pomerene, Ambler & Pomerene, and R. W. McCaughey, for defendants in error.*

**PATTERSON, J.**

Heard on error.

This cause comes into this court on error to the judgment and finding of the court of common pleas, and the sole question presented for consideration is whether the act of April 16, 1913

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\* Motion to require the Court of Appeals to certify its record in this case overruled by the Supreme Court, December 22, 1919.

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(103 O. L., 369), provides the only method whereby a mechanic's lien may be perfected as between private individuals, firms or corporations.

The plaintiff in error attempted to secure a lien on the property of the Massillon Foundry & Machine Company by virtue of Sec. 8324, G. C., *et seq.*, the record disclosing the fact that the last item of labor performed or material furnished was July 11, 1917, and that the lien was filed with the county recorder October 20, 1917; that is to say, the lien was filed within four months but not within sixty days of the date of the last item.

The provisions relating to mechanics' liens are found in Sec. 8308 to 8342, G. C., inclusive. On April 16, 1913 (103 O. L., 369-379), the General Assembly passed an act the title of which is as follows:

"An act to create a lien in favor of contractors, sub-contractors, laborers and material men, and to repeal Secs. 8308, 8310, 8311, 8312, 8313, 8314, 8315, 8316, 8317, 8318, 8319, 8320, 8321, 8322, 8323, 8330, 8333, 8334, 8335, 8336, 8337, and 8338 of the General Code."

The laws were further amended and supplemented May 27, 1915 (106 O. L., 522-534), in an act entitled:

"An act to amend Secs. 8312, 8313 and 8314 of the General Code; and to further supplement Section 8321 of the General Code by the enactment of an additional section to be known as Section 8321-1 (103 O. L., page 369, at pages 370, 372, 374 and 376), relative to the mechanic's lien law."

An examination of the above acts discloses that Secs. 8309, 8324, 8325, 8326, 8327, 8328, 8329, 8331, 8332, 8339, 8340, 8341 and 8342 were not specifically repealed by either of the above enactments.

It is claimed on the part of the plaintiff in error that there are now two distinct methods whereby a lien can be secured against a private individual firm or corporation, viz., by the method in force before the enactment of the above two amendments, and by the method prescribed in the above amendments.

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In this case plaintiff in error pursued the former course, and claims thereby to have secured a lien on the property of the defendant in error.

An examination of the amendments and of the statutes that were unrepealed leads us to the conclusion that the General Assembly has attempted to provide two separate and distinct methods of taking liens, upon two separate and distinct subjects, the one for private contracts and the other for public contracts.

The rule as found on page 118 in *Thorniley v. State*, 81 Ohio St., 108 (90 N. E., 144), is well recognized:

"It is also true that repeals by implication are not favored, the meaning of which is, and it must be, only that a court will not, in the absence of an express repeal, consider former legislation as repealed by implication when the former and later act may be harmonized by reasonable construction so as to continue both in operation. It is consistent with the elementary rule, always of the written law, that the present will of the Legislature is found in its latest expression."

While repeals by implication are not favored, there is still another rule of construction, which will be found quoted with approval in the *Lorain Plank Road Co. v. Cotton*, 12 Ohio St., 263, at page 272:

"A subsequent statute revising the whole subject matter of the former act, and evidently intended as a substitute for it, although it contains no express words to that effect, operates to repeal the former."

The holding of the court in *Shelby Co. Comrs. v. Frego & Binkly*, 26 Ohio St., 488, is to the same effect.

The title of the act of April 16, 1913, is "To create a lien in favor of contractors," etc., not to provide them with an additional remedy. An examination of the entire act shows that it furnishes a complete remedy, and it is evident that the General Assembly intended this act as a substitute for all existing laws relative to mechanics' liens as between private individuals,

firms or corporations. It is the present will of the Legislature as found in its latest expression.

It is contended that Sec. 8324 is not specifically repealed, and that it refers to Secs. 8308, and 8316, both of which sections have been specifically repealed, and that this reference still leaves them unrepealed to all intents and purposes. However, we are of the opinion that that part of this section which refers to Secs. 8308 and 8316, is repealed by implication and is inconsistent with the later enactments.

The method of perfecting a lien is prescribed in the amended acts; it is an exclusive one; the plaintiff in error not having followed this method its lien is void.

The judgment and finding of the court of common pleas will be affirmed.

HOUCK and SHIELDS, JJ., concur.

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**APPEAL FROM REFUSAL OF COMPENSATION TO INJURED WORKMAN.**

Court of Appeals for Jefferson County.

**JOSEPH VALACEK ET AL V. THE INDUSTRIAL COMMISSION OF OHIO ET AL.**

*Workmen's Compensation Law—Appeal from Refusal of Industrial Commission to Allow Compensation—Appeal—How Perfected—Employer Required to be Made Defendant—When Employer May be Made Defendant After More than Thirty Days from Date of Filing Appeal.*

1. Where an employee was injured on the 1st day of April, 1917, in the service of an employer who had elected to pay compensation directly to its injured employees and upon refusal of the employer to pay compensation, a claim for an allowance was filed with the Industrial Commission which also denied compensation and on the first day of March, 1918, notified claimants that: "Compensation is denied," and an appeal is taken to the court of common pleas within thirty days from the date of final action by the Commission, the act or amendment of 1917 (107 O. L., 157-162) passed March 20, 1917, effective June 28, 1917, applies with reference to whom should be made defendant, rather than the act or amendment of 1913 (103 O. L., 88, Section 43; Section 1465-90, General Code), and therefore the employer instead of the Industrial Commission should be made defendant, although the cause of the action arose under the act of 1913.
2. An appeal from the final action of the Industrial Commission is perfected under Section 1465-90, General Code, when within 30 days after notice of rejection by the Commission a claimant files his notice or declaration of appeal in the Court of Common Pleas showing the refusal of such Commission to allow compensation.
3. Where an appeal is filed by a claimant for compensation, within 30 days after notice of final action by the Commission under the act or amendment of 1917 (107 O. L., 157-162) and the commission instead of the employer is made defendant and later, on motion, is dismissed, the appeal is effective against the employer who may, by proper amendment, be made defendant by leave of court, and out of rule, as in other civil actions, and more than thirty days from the date of filing the appeal.

*R. G. Porter and F. M. Coleman*, for plaintiffs in error.

*John G. Price*, attorney general, *R. R. Zurmehley*, special counsel, and *Roy R. Carpenter*, prosecuting attorney, for the Industrial Commission of Ohio.

*A. C. Lewis*, for the U. S. Coal Company, a defendant in error.

FARR, J.

Heard on error.

The action in the court below was to recover for personal injuries resulting in the death of one Frank Valacek on the first day of April, A. D. 1917, while in the employ of the U. S. Coal Company which had elected to pay compensation directly to its injured employees, or their dependants under the provisions of the workmen's compensation law of Ohio. Application was accordingly made by the plaintiffs in error to the company, which was refused, and thereupon application was made to the Industrial Commission of Ohio to fix compensation, which was likewise refused and notice of such refusal was served on claimants on the first day of March, 1918. On the 21st day of March, 1918, notice or declaration of appeal was filed in the court of common pleas of this county against the Industrial Commission and on the same day a waiver of summons was filed or an appearance entered for the commission by the prosecuting attorney of Jefferson county. On the 17th day of April, 1918, a petition was filed against the commission to recover compensation for the death of the decedent. On October 10, 1918, plaintiffs filed an amended petition, making the United States Coal Company a party defendant, and summons duly issued. On December 11, 1918, a demurrer was filed to the petition by the coal company and sustained as to the sixth ground.

A motion was made by the commission asking to be dismissed as a party defendant, which was sustained. On January 3, 1919, an amended petition was filed, to which a demurrer was later filed, and sustained, and judgment was entered for the defendant company, to which error is prosecuted here upon two grounds.

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First. That the court below erred in sustaining the motion of the commission to be dismissed as a party defendant.

Second. That the trial court erred in sustaining the demurrers and entering judgment for the defendant coal company.

As to the first assignment for error, it is urged that since the injury occurred on the first day of April, 1917, that the act of February 26, 1913, approved March 14, 1913, 103 O. L., 72, 92 Secs. 1465-1A to 1465-106, G. C., relating to the powers, duties, etc., of the State Liability Board of Awards controls rather than the amendment to that act, 107 O. L., 157-172, which was passed March 20, 1917, approved March 29, 1917, but which it is urged did not become effective until the expiration of the referendum period, June 28, 1917, about two months after the death of Frank Valacek.

It is contended therefore that the latter act does not apply because not in effect at the date of the death of decedent, and for that reason, it is claimed that the Industrial Commission should not have been dismissed as a party defendant because the act of 1913 provides (103 O. L., 88, Sec. 43, Sec. 1465-90, G. C.) that in case of an appeal to the court of common pleas, the appellant shall file his petition in the ordinary form "against such board." One of the amendments made, and the one of importance here, in the act of 1917, is that in case,

"Said commission denies the right of claimant or claimants to receive or to continue to receive compensation from an employer who has duly elected to pay compensation, medical, hospital and nursing, services and medicines and funeral expenses direct to his injured and the dependants of his injured employees \* \* \* the claimant or claimants shall have the right to appeal to the common pleas court of the county in the same manner as in claims against the state insurance fund \* \* \* except that the employer shall be the defendant in such proceedings." 107 O. L., 163, Sec. 1465-90.

The material change made by the amendment, therefore so far as the instant case is concerned, is that the employer, instead of the commission, shall be the defendant in such proceedings, this change, however, relates wholly to the procedure,

and not to a substantive cause of action, and it is not material if the right of action did arise in the case at bar under the act of 1913, because it is not a question of whether or not there is a right or cause of action, but of whom should be made defendant, of what constitutes or is required to perfect an appeal, and whether the coal company was properly made a party defendant. There was no right of appeal until compensation was refused by the commission and the applicant must comply with the law then in force as to procedure and not with a former statute.

March 1st, 1918, notice was given claimants by the commission that: "compensation is denied." The act of 1917, effective June 28, 1917 (107 O. L., 157-162), was therefore in effect so far as procedure was concerned; consequently the employer rather than the commission must be made defendant and the court below properly sustained the motion to dismiss the commission. The next and last assignment for error is that the trial court erred in sustaining the demurrers to the amended petitions and entering judgment for the defendant company which had been made a party defendant by amendment to the petition. The demurrers were doubtless sustained, upon the theory that the appeal as to the coal company had not been perfected within the statutory period of thirty days after the notice of final action by the commission, March 1, 1918.

On March 21, 1918, claimants filed their notice or declaration of appeal in the court of common pleas against the Industrial Commission and on the same day a waiver of summons or an appearance was entered by the prosecuting attorney of Jefferson county, and within thirty days thereafter, on April 17, 1918, a petition was filed as provided in said amended Sec. 1465-90, G. C. The amended petition making the United States Coal Company a party defendant was filed October 10, 1918, and summons issued. Was the notice or declaration of appeal filed in the instant case sufficient to invest the court of common pleas with jurisdiction? Said Section 1465-90, G. C., as amended 107 O. L., 162-163, provides that:

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"The claimant, within thirty (30) days after the notice of final action of such commission, may, by filing his appeal in the common pleas court \* \* \* be entitled to trial in the ordinary way. \* \* \* Within thirty days after filing his appeal, the appellant shall file a petition in the ordinary form."

The above Section 1465-90, G. C., uses the words "appeal" and "petition" and fixes the time within which each shall be filed; therefore they were evidently not intended to mean one and the same thing; it was obviously the legislative intent that the filing of notice or declaration of appeal by a claimant in the court of common pleas, within the statutory period after notice of the final action of the commission, should constitute an "appeal" within the meaning of the statute; if it were otherwise, the Legislature could just as well have omitted the separate provision as to "appeal" and simply have provided that the petition be filed within thirty days after notice of final action by the commission, and that the same should constitute or perfect an appeal; and the workmen's compensation law being remedial should be liberally construed as held in *Roma v. Industrial Commission*, 97 O. S., 252, 253, where Nichols, C. J., observes:

"We feel that if he be defeated by a technicality, although a proper and just one, it would be quite out of harmony with the underlying objects, the General Assembly had in view in enacting the law. The state of Ohio, by the very terms of the law, becomes in fact the representative, if not the champion of the claimant to the extent of seeing that exact justice is done him, and it is quite manifestly the intention of the law that the ordinary rules of procedure, although wise and fair in the abstract, must give way, if, in adhering to them, any conclusion even savoring of injustice would result. Sec. 1465-91, G. C., provides that 'such board (the board of awards) shall not be bound by the usual common law or statutory rules of evidence or by any technical or formal rules of procedure other than as herein provided.' It is the conception of this court that the section of the law just quoted is, in a sense, binding on the courts that may review these investigations. Whenever it may be made to appear that by a strict adherence to technical rules the substantial rights of the party are in jeopardy, it is the plain duty of the courts \* \* \* to disregard such rules."

The foregoing is in harmony with the legislative intent as declared in the law itself and as indicated in above Sec. 1465-91, G. C.

Therefore, clearly the filing of notice or declaration, such as was filed in the case at bar was sufficient to perfect the appeal and to invest the court of common pleas with jurisdiction of the subject matter; but was it effective as to The United States Coal Company which was made a party defendant by the amended petition filed as above stated on October 10, 1918, upon which summons was issued and returned properly served? On December 11, 1918, the coal company filed what might well be termed a general demurrer, setting out some six different grounds, the last of which was that the petition did not state facts sufficient to constitute a cause of action, and which relates only to matters of substance and which distinguished the general from a special demurrer at common law, the distinct offices of which were there recognized, but which are not retained in the new procedure, except that convenience and common usage are sufficient warrant for their adoption.

The demurrer was sustained and the petition was amended, to which a similar demurrer was filed and sustained and judgment entered for the defendant company. Such demurrers are by the Code, Sec. 11303, G. C., made pleadings, and were sufficient to enter the appearance of the coal company. In *Wilson v. Wilson*, 30 O. S., 372, it is said:

"We think the defendant voluntarily submitted himself and the new cause of action to the jurisdiction of the court, by demurring only on the ground that the petition did not state facts sufficient to constitute a cause of action. It would have been otherwise had he demurred specially on the ground that the court had no jurisdiction of the subject of the action. But by demurring generally and subsequently answering to the merits, he waived all right to object to the jurisdiction which he had himself invoked."

The court clearly holds in the foregoing that an appearance was entered by the general demurrer. However, there is another reason why the appeal was effective against the coal com-

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pany. The court of common pleas had been invested with jurisdiction of the subject matter of the action by the appeal, and might, therefore, properly permit the company to be made a party defendant if necessary to a determination of the issues, dependent of course, upon a proper amendment and possibly service of summons. Just as the filing of a transcript on appeal from the docket of a justice of the peace invests the court of common pleas with jurisdiction and thereafter any person necessary to a determination of the issue may be made a party. The proceeding in the instant case is purely statutory and since the right of appeal is provided and was perfected by filing notice or a transcript and it is also provided that the employer instead of the commission shall be made defendant, the appeal was effective against the coal company although the commission was by mistake primarily made defendant, and it is doubted whether service of summons was necessary; the appeal itself was notice to the company just as an appeal is notice in other civil actions. The petition was not filed within thirty days from the appeal, but the court gave leave to file an amended petition out of rule just as leave is granted in other civil actions. The statute fixes the status of the employer as defendant, which relation practically exists before the commission because if an award be made it would be against the employer. Therefore, since the court of common pleas had been invested with jurisdiction of the subject matter of the action, and the coal company was made a party defendant and filed a general demurrer, the conclusion must be that jurisdiction attached at the time of filing the appeal, and that it was effective as against the defendant coal company, and the demurrer, therefore, should have been overruled. It follows that the judgment of the court below must be reversed, and it is so ordered.

METCALFE, P. J., and POLLACK, J., concur.

**SUBMISSION TO DEFENDANT OF PANEL FOR JURY IN FIRST  
DEGREE MURDER CASE.**

Court of Appeals for Summit County.

**CAFERELLI v. STATE OF OHIO.\***

Decided, November 13, 1919.

*Criminal Law—Statutory Provisions Mandatory as to the Summoning and Impaneling of Juries in First Degree Murder Cases—Submission to Defendant of Incomplete Panel of Jury in Violation of his Rights—Error in Refusing to Grant Continuance for Examination of the Panel by Defendant.*

1. In prosecutions for first degree murder the forms of law should be strictly followed, and the provisions of statutes conferring rights in favor of the accused in the method and manner of summoning and impaneling juries are mandatory.
2. Section 13648, General Code, providing that a copy of the panel of the jury shall be delivered to the accused at least three days before his trial for homicide, is mandatory and confers a right upon the defendant, which if denied constitutes prejudicial error justifying a reversal of a judgment of conviction.
3. A copy of a panel required to be delivered to the accused in accordance with Section 13648, General Code, should contain the names of thirty-six qualified persons who have been served and returned by the sheriff.
4. Where the trial has proceeded by the examination and acceptance of one juror, it is error for the court to refuse a defendant a continuance of three days in which to examine the qualifications of persons summoned by an additional venire issued under Section 13643, General Code, although the defendant has been duly served before trial with a copy of the sheriff's return containing less than thirty-six names on a venire issued under Section 13642, General Code.

*J. V. Zottarelli and Hole & Hole, for plaintiff in error.*

*C. G. Roetzel, Pros. Atty., for defendant in error.*

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\*Motion to require the Court of Appeals to certify its record in this case overruled by the Supreme Court, December 22, 1919.

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**VICKERY, J.****Heard on error.**

This cause comes into this court on a petition in error to the common pleas court of Summit county to reverse a judgment of the court of common pleas entered upon a verdict of first-degree murder found by the jury, and without recommendation for mercy. The defendant, Peter Caferelli, was sentenced to be electrocuted, which sentence was suspended pending error proceedings in this court.

Some eight assignments of error are set forth in the petition in error, many of which it will not be necessary for us to consider in view of the conclusion that we have reached respecting one of the assignments of error. Suffice to say that we would be unable to agree with the claims of the plaintiff in error that the verdict was not sustained by sufficient evidence; nor do we think there was any error in the refusal of the court to allow a change of venue, for whether a court will grant such a motion and allow such a change of venue is largely a matter of discretion of the court and we can not find from this record that the court abused such discretion. Nor do we find any error that is prejudicial in the court's refusal to charge as requested by the defendant below, inasmuch as those requests were contained in the written propositions to charge before argument, and there being at that time, if there is at present, no duty of the court requiring that it should grant the requests before argument either for the state or for the defendant. Nor do we find any error prejudicial to defendant in the general charge of the court.

But we are met with a situation at the very threshold of the trial which challenges our attention, which is directed to the second assignment of error, to-wit, the failure of the court to grant a continuance of the cause on motion. The assignment of error in the overruling of the motion relates to the manner in which the jury was empaneled.

Section 13642, G. C., provides:

"When a person indicted for a capital offense pleads not guilty, the clerk, on the precipice of the prosecuting attorney,

shall draw from the jury-box, as in other cases, thirty-six ballots, and issue to the sheriff a venire for the persons whose names are so drawn, for the day fixed for the trial; such venire shall be served and returned by such sheriff at least fifteen days before the day so fixed. If a person named therein is dead, insane, absent, removed from the county, or not an elector thereof, or has been convicted of felony and not pardoned, the sheriff shall note the fact in his return."

Section 13643, provides:

"If it appear to the clerk, by the return of the sheriff, that a person named in the venire is dead, insane, absent, removed from the county, or not an elector thereof, or has been convicted of a felony and not pardoned, the clerk shall draw from the box a number of ballots equal to double the number of such persons dead, absent or so disqualified, and issue to the sheriff a venire for them, for the day fixed for the trial. The sheriff shall serve and return such venire as soon as possible, in the manner provided in the next preceding section. If it appear to the clerk, from such return, that the names of thirty-six qualified jurors are not in the venires, he shall draw ballots and issue venires, to be served and returned in like manner, until the required number thereof are summoned."

Section 13644 provides:

"The first thirty-six jurors answering to their names at the trial, and without the disqualifications named in the next preceding section, *shall constitute the panel*. If it appears to the court upon the impanelling of such jury that there are not thirty-six jurors summoned and present, without such disqualifications, the court may, and, upon motion of the defendant, shall order the clerk to draw from the box, as in other cases, a sufficient number of ballots to make thirty-six competent jurors."

Section 13648 says:

"A copy of the panel of the jury returned by the sheriff shall be delivered to a person so indicated at least three days before the day of trial."

Now, referring to Sec. 13644, where it says that "the first thirty-six jurors answering to their names \* \* \* shall constitute the panel," it is perfectly evident that when, in Sec.

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13648, it says, "A copy of the panel of the jury returned \* \* \* shall be delivered to a person so indicted at least three days before the day of trial," it must mean that a copy of the entire list of jurors, to-wit, thirty-six that the sheriff has been able to locate and return under the various ways and venires designated and provided in the preceding section of the statute, shall be the list of names that are served upon the defendant.

In the case at bar thirty-six names were drawn from the wheel as the statute requires, upon a precipe of the prosecuting attorney, and were given to the sheriff by the clerk. The sheriff served all these men with the exception of three. Thereafter a new venire was issued for six names, and these were served, or enough of them were served to make the thirty-six names. The record shows that the sheriff served a copy of his return upon the defendant, that three of the men named in the first venire were not found and that subsequently the new venire was issued and a copy of that return was served on the defendant by the sheriff; but the record does not show that the entire panel was served upon the defendant at any time *before* trial.

It appears that the first thirty-three names were served upon the defendant within the time allowed by the statute, but that after the trial had proceeded, by starting to impanel the jury, one man having been selected, a copy of the writ summoning three to fill up the panel was served upon the defendant. It was then that an application was made for time in accordance with the statute, which ultimately resulted in a motion by the defendant in open court for a continuance for three days in order to have time to examine into the qualifications of these three names. Whereupon the court stated that the defendant should have ample time to examine these three names, but insisted upon going forward with the examination of the other men still unexamined, who constituted the first thirty-three names of the panel, all of which was done over the objection of the defendant, and exceptions properly taken.

Finally the court inquired how much time the defendant wanted, and he insisted, through his counsel, that he was entitled to the three days and would not consider any other prop-

osition. The court said he felt disposed to give him from eleven o'clock until half-past one that day, and when the defendant insisted upon the three-day continuance the court said he would not give any such time and counsel might as well proceed with the trial.

The trial was proceeded with over the objection of the defendant, and the exception was saved in the record.

Now, then, the question is, whether this failure to have the panel of thirty-six names served upon the defendant within at least three days before the trial is such error as would warrant a reversal of this judgment.

We have long since got by the day when cases should be reversed for mere technicalities, and, unless a *right* of the defendant was abridged by the failure to have the proper panel served upon him, it was merely a technical error and should not be considered by the court; if a *right* was abridged the contention is warranted.

We are of the opinion that in so grave a case as one of the first-degree homicide, where a man's very life is at stake, the forms of law should be strictly followed, and that the method pointed out by the statute is not merely directory but mandatory.

"Generally, when no rights will be impaired, provisions, with no negative words or implications, concerning the time and manner, and more especially the time, in which official persons shall perform designated acts, are directory. \* \* \* And largely the statutes relating to the time and manner of summoning and bringing in jurors are of this class. (Citing *State v. Pitts*, 58 Mo., 556; *State v. Gillick*, 7 Iowa, 287; *State v. Smith*, 67 Me., 328, and other cases.) The same is true of those providing for other steps in a judicial cause. But a provision of this or any other sort which, though in the nature of a command to an officer or court, confers rights on parties, is generally or always mandatory." Bishop, Statutory Crimes (3 Ed.), Sec. 225, citing *Ex parte Jordan*, 94 U. S., 248; *People v. Livingston*, 68 N. Y., 114; *Wendel v. Durbin*, 26 Wis., 390, and *State v. Cooper*, 45 Mo., 64.

We think defendant had a right to have a copy of the panel of the jury delivered to him at least three days before the day

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of trial; in other words, that Sec. 13648 conferred upon such person a right, and made the method of procuring the panel mandatory, and that defendant was entitled to have all the names of the entire panel in time to examine them and inquire into their qualifications, or biases, or prejudices, before being compelled to submit his life to their judgment.

In the case of *McGill v. State*, 34 Ohio St., 228, it was held, reading from the first proposition of the syllabus:

"Where, in a capital case, a person not summoned as a juror personates one who was returned on the venire, sits at the trial and joins in a verdict of guilty, the verdict will be set aside and a new trial granted, it appearing that neither the accused nor his counsel was guilty of laches."

It appeared in that case that one Eli Stephenson, whose name was on the venire, was regularly summoned and returned by the sheriff as a juror for the trial of the cause. At the trial the father of the juror so summoned, but bearing the same name in full, appeared, and, when the name of Eli Stephenson was called, answered to the same, stepped forward, took his seat in the jury box, and sat at the trial. The discovery that he was not the juror summoned was not made until after the trial was over, when a motion for a new trial was made, by the accused on the ground that he had not been tried by a legally constituted jury. The motion was overruled, upon which action of the court error was predicated. Judge Boynton, speaking for the court, takes up at length the question here under discussion and on page 236 says:

"The statute (74 O. L., 345, Sec. 7), requires a copy of the panel of the jury returned by the sheriff to be delivered to the accused at least three days before the day of trial. This requirement was complied with in the present case. The plaintiff was, therefore, apprised that one Eli Stephenson was one of the regular jurors summoned for his trial; and when such juror was called, a person by that name appearing and answering thereto, we think he might well assume such person to be the regular juror. If the person so appearing had borne another name, and had personated the absent juror, this clearly, under the authorities, would have been ground for a new trial, if the

fact of such personation was unknown to the accused in time to correct the error before he was prejudiced thereby."

The court quotes this to show that the party had the right to have a panel served upon him, and, that, inasmuch as a man bearing the same name as the man in the panel answered to the name, the defendant was not guilty of laches, and, therefore, had waived none of his rights, but the court says, page 237:

"The irregularity being such as materially to affect a substantial right of the accused, and by which he was prevented from being tried by a legally constituted jury, the verdict should have been set aside and a new trial granted."

We draw from this that the right to have a copy of the panel served upon the defendant at least three days before the trial was a substantial right of the defendant, and that that didn't mean a *part* of the panel but the *entire panel of thirty-six names*.

If this was a right that the defendant had, then of course a departure from the statutory method would be a violation.

In the case of *Cantwell v. State*, 18 Ohio St., 477, it is said at page 480, that when the Legislature has clearly evinced a purpose to distinguish the practice in criminal trials from that allowed in civil cases, and to prohibit in one class of trials what is permitted in the other, the provisions must be regarded as mandatory.

Now it will be noticed that the Legislature has seen fit to provide a particular way for procuring a jury in first-degree homicide cases, different from that in all other criminal cases, and when it marked out the manner in which that panel should be selected, and provided for the issuing of various venires to obtain the result, the law must have been mandatory and for the very purpose of conferring a right upon the defendant; which, of course, he might waive. But in this case he didn't waive, so when he insisted, by his attorneys, that he have three days from the time the completed panel was served upon him, he was clearly within his rights.

In *Thurman v. State* (4 C. C., 141, 2 Circ. Dec., 466), it is held that where a copy of the panel is served less than three

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days before the time set for trial, and the case is then laid over to a future day more than three days after the defendant receives a copy of the panel, there is no error.

Again, in *Williams v. State*, 11 C. C. (N. S.), 4, in the first proposition of the syllabus, it is held:

"A verdict of conviction will not be set aside on the ground that a true copy of the panel as returned by the sheriff was not delivered to the accused as required by Sec. 7273, R. S., where the irregularity complained of is not carried into the bill of exceptions but is brought to the attention of the court by an affidavit to which is attached a paper writing and what purports to be a copy of the jury panel."

In *Williams v. State* it was attempted to show by affidavit outside of the record that a true copy of the panel as returned by the sheriff was not delivered to the defendant, and the court held that it was powerless to consider matters outside of the record, and in respect to the affidavit that it did not bring the matter into the record at all and was not in condition to be considered by the court. The inference from the ruling of the court in this case is clear, that if this objection was made at the time and a proper exception taken, and it was properly in the record, then the failure to deliver a true copy of the panel would have been a fatal error which would have warranted the reversal of the court below. Judge Taggart, rendering the opinion of the court, cited several authorities in Ohio and outside of the state to show what was properly a part of the record and could be considered by the court.

From these authorities, and many others to which our attention has been directed, we are clearly of the opinion that the defendant had the right to have this panel of thirty-six names served upon him at least three days before the trial, and that he objected to the fact that it was not so served upon him and carried it into the record and took a proper exception, so that it can not be said that he waived his rights in any way whatever. We are therefore obliged, under the authorities, much as we dislike to do so—for we have not only considered this record, but the record in the case in which his associate, Vincent Damico, was convicted—and we believe the two records

show conclusively that the jury were warranted in rendering the verdict they did—we are therefore obliged, and under the circumstances we say we regret that we are to reverse this case and remand it to the court of common pleas for a new trial.

Just who is to blame for having this situation brought about it is not for us to say. Suffice it to say that when a man is charged with the gravest of all offenses, for which his life is the forfeit, he is entitled, nay, is guaranteed by the Constitution of the state of Ohio and the Constitution of the United States, to have all the safeguards of the law thrown around him, and it will not do for the officers who have charge of the enforcement of the law to neglect or refuse to obey the plain mandates of the law as to the manner and method of selecting the instruments through which the law must be carried into effect.

In a recent decision, which reverses this court, in the case of *Cleveland Ry. v. Brescia*, 100 Ohio St., 267, the Supreme Court of Ohio has tightened up the lines on the selection of jurors even in civil cases, and has ruled the method of selection of jurors mandatory, where hitherto the courts have been constrained to hold it directory merely. I cite this to show that in spite of the modern trend of the judiciary to avoid mere technicalities, and to hold much as directory which otherwise would be mandatory, here is the last announcement of our Supreme Court on that proposition holding the officers whose duty it is to select jurors to a strict adherence to the law.

We are therefore constrained to come to the conclusion that the court erred in refusing to grant the postponement as requested by the plaintiff in error; that the error is such that the plaintiff in error's substantial rights were interfered with; that he did not, and could not under such conditions, have such a trial as was guaranteed to him by the law; that the court for this reason should have granted the motion for a new trial; and that the refusal to do so was error so prejudicial to the defendant that the case should be and is hereby reversed and remanded to the court of common pleas for new trial.

DUNLAP and WASHBURN, JJ., concur.

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Cuyahoga County.

**QUESTION OF NEGLIGENCE IN ATTEMPTING TO ALIGHT  
FROM A SLOWLY MOVING CAR.**

Court of Appeals for Cuyahoga County.

**CLEVELAND RAILWAY V. HILL.\***

Decided, May 29, 1919.

*Negligence—Woman Boards Car--Then Finding her Companion Failed to get on she Attempts to Alight and is Injured—Proper Instructions to the Jury in such a Case.*

1. Negligence as a matter of law is not established by the mere fact that a passenger attempts to board or alight from a street car which is slowly moving; but it is a question of fact for the jury whether a person exercising ordinary care under the circumstances could have alighted without danger of being injured.
2. In an action for damages for injuries received by a passenger in attempting to alight from a street car, it is not error to refuse to charge the jury that damages can not be recovered if the jury find that plaintiff fell from the car under circumstances different from the allegations of the petition, where unimportant, as well as important and essential circumstances are alleged.
3. In such an action it is not error to refuse to charge the jury that plaintiff can not recover unless the jury find that the car was standing still when plaintiff attempted to alight and was thereafter suddenly moved forward, where the petition contains other allegations of negligence in the operation of the car, which if established would entitle plaintiff to recover damages.

*Squire, Sanders & Dempsey, for plaintiff in error.*

*Payer, Winch, Minshall & Karch, for defendant in error.*

**WASHBURN, J.**

Heard on error.

This is a proceeding in error brought by the Cleveland Railway to reverse a judgment rendered in the common pleas court against it and in favor of Eva M. Hill, defendant in error.

\*Motion to require the Court of Appeals to certify its record in this case overruled by the Supreme Court, October 21, 1919.

The claim of Mrs. Hill in the court below was that she boarded a car of the company and became a passenger, but, noticing that her companion had failed to board the car, she made known that fact to the conductor, who opened the door for her to alight, and, while she was in the act of alighting, the conductor caused the car to start forward, thereby throwing her to the pavement and injuring her. She claimed that she was not given a reasonable time and opportunity to alight in safety.

The company answered, admitting its corporate existence and its ownership and operation of the street railway, and denying all the other allegations of the petition.

The company did not plead contributory negligence or set forth its claim of how the accident happened.

At the trial there was a sharp conflict in the evidence as to whether the car started while Mrs. Hill was alighting, or whether it was moving when she started to get off and she therefore voluntarily got off while it was in motion.

It is established that the car was standing on an incline, and that it started forward, but stopped after going somewhere between three and ten feet, and it is apparent that if it was moving when she started to alight it was moving very slowly. It was a side entrance car and the step was near the pavement, and the situation and circumstances were such that a person *exercising ordinary care in doing so* could step off without very great danger of being injured. The circumstances were such that the mere fact that the car was moving when she started to alight, if that was the fact, would not constitute her act of stepping off an act of negligence as a matter of law. *Ashland Rapid Transit Co. v. Holmes*, 67 Ohio St., 153.

There was evidence that she stepped off backwards and in other particulars did not exercise ordinary care in alighting, and the evidence raised the issue of her contributory negligence, but no claim is made in brief or argument that the court did not properly charge the law on the subject of contributory negligence in instructions before argument, and in the general charge. It is, however, claimed that the court committed error in refusing to instruct the jury before argument as follows:

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"8. If you find from the evidence that the plaintiff boarded the car just as it started, or as it was in motion, and thereafter voluntarily left it by stepping from it while in motion, and fell, she can not recover and your verdict must be for the defendant."

"15. If you find from a preponderance of the evidence that the plaintiff got aboard the car, and after reaching the first step suddenly changed her mind and attempted to alight therefrom while the same was in motion, she can not recover and your verdict should be for the defendant."

If these requests properly stated the law, and were not covered by other instructions given before argument at the request of the company, it was error not to have given them, and such error could not be cured by properly charging the law in the general charge.

It is likewise settled that if the requests were in any respect incorrect, it was not error to refuse them. It will be noticed that none of the circumstances bearing on the manner of her alighting or her care or lack of care in alighting were embodied in the requests except the mere fact that the car was moving and that her act was voluntary.

As we understand the law, it is not negligence as a matter of law under all circumstances to alight from a moving street car. That question is for the jury to determine after a consideration of *all* the circumstances. We hold that the requests were properly refused because they made the mere voluntary stepping from the car while in motion conclusive of her right to recover.

It is also urged that the court erred in refusing to give the following instruction before argument:

"7. The plaintiff is entitled to recover upon the allegations of the petition; and if you find that she fell from the car under circumstances different from the allegations of the petition, she can not recover and your verdict should be for the defendant."

A sufficient reason why this request was properly refused is because it is entirely too broad and general.

Under it, if plaintiff failed to prove one slight circumstance

in connection with her fall from the car just as she had alleged it in her petition, she would be turned out of court.

That is an entirely too technical view of the law. Many circumstances were alleged, and some were important and essential, and failure of proof in some unimportant particular would not be fatal, as a matter of law, to her right of recovery.

It is further claimed that there was error in the court's refusal to give instruction No. 14 before argument, which was as follows:

"14. Unless you find from a preponderance of the evidence that the car was standing still when the plaintiff attempted to alight therefrom, and was thereafter suddenly mover forward, causing her to be thrown, she can not recover in this action and your verdict should be for the defendant."

It is claimed that the plaintiff, having alleged that the car was standing when she attempted to get off, and that it started just as she was stepping from the car, must prove such allegation, or fail in her action, because she is confined to the allegations of her petition for a recovery. This contention, in effect, makes her case depend upon one allegation. Was that allegation the all-important and controlling question in the case?

The plaintiff alleged that the car was standing still when she got on, and the record sustains that allegation. She also alleged that the car was moving at the instant she left the car, and that is not disputed. It therefore started after she got on, and before she got off. The record establishes that she got off almost immediately after she got on. When she landed on the pavement the car at most had gone a very short distance, and her acts of boarding the car and alighting from the car were very closely connected in point of time. The door of the car was necessarily open when she got on and also open when she got off. It is true that she alleged that the car started just as she was stepping from the car, but that is not the only allegation in the petition.

The petition also alleged that the defendant, by its agents and servants, so carelessly and improperly managed and con-

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trolled said car that the plaintiff was not allowed the proper and reasonable time, attention and opportunity to safely alight therefrom, and that by reason of such carelessness and negligence the plaintiff, without fault on her part, was thrown to the pavement and injured.

In the light of these circumstances it seems to us that the case could not be properly narrowed down to and made to turn upon the exact instant the car started. The plaintiff charged improper management and control of the car, and that she was not allowed proper and reasonable time and opportunity to safely alight. The starting of the car at a particular time was one of the items or acts of negligence which the plaintiff claimed prevented her from having a proper and reasonable time and opportunity to safely alight, an important act or item to be sure, but not the only one, nor necessarily the controlling one; it was, therefore, not error not to charge that if she failed to establish the exact time of the starting of the car just as she had alleged she could not recover.

It is true that the issues of a case are defined by and confined to the pleadings, but the plaintiff is not confined to one issue or one act of claimed negligence. The whole transaction was set forth. Other circumstances were alleged, such as that the conductor opened the door for her to alight and ordered her to get off, and it was charged that when all the circumstances were considered the company was guilty of negligent conduct in failing to allow Mrs. Hill proper and reasonable time and opportunity to safely alight from one of its cars, and that she was thereby injured.

When these requests to charge before argument were refused, the court, at the request of the railway company, gave the following instructions, among others, to-wit:

"3. Negligence is never presumed, and in this case before the plaintiff is entitled to recover she must establish negligence by a preponderance of the evidence, and if she has failed to do so, your verdict must be for the defendant.

"4. Before the plaintiff can recover in this action, she must have established by a preponderance of the evidence three things: first, that the defendant company was negligent in some

one or more of the particulars charged in the petition, and which the court has submitted to you; and, second, that such negligence was the direct and proximate cause of her injury; and, third, that her present condition as established by the proof, is the proximate result of that injury—for unless you find there is a direct connection between the injury and the condition, she can not recover for that condition."

"10. If you find from a preponderance of the evidence that the defendant was negligent, and you further find from a preponderance of the evidence that the plaintiff herself was negligent, or you find from the plaintiff's own testimony an inference of negligence which she has failed to remove, and you further find that the negligence of each was concurrent with the negligence of the other and acted together in producing the accident, there can be no recovery by the plaintiff in this case, and your verdict should be for the defendant.

"11. If the plaintiff by a preponderance of the evidence has established that the defendant was negligent in some one or more of the particulars charged in the petition and submitted to you by the court, and she has further established by a preponderance of the evidence that the same was the direct and proximate cause of her injury, nevertheless, if from her own evidence an inference of her own negligence causing or directly contributing to cause her injury has arisen, and she has failed to remove that inference, she can not recover, and your verdict should be for the defendant.

"12. No matter how negligent the defendant may be proved to have been, if from all the evidence there is a preponderance of proof showing that the plaintiff herself was negligent, no matter how slight, and that such negligence on her part caused or directly contributed to cause her injury, she can not recover and your verdict should be for the defendant."

For the reasons indicated we hold that under all the circumstances disclosed by the record it was not error to refuse said requests 7, 8, 14 and 15.

We can not say that the judgment is manifestly against the weight of the evidence, or that it is excessive.

Judgment affirmed.

DUNLAP, P. J., and VICKERY, J., concur.

**SWITCHMAN KILLED BY FAILING TO OBSERVE  
APPROACHING TRAIN.**

Court of Appeals for Hamilton County.

**NORFOLK & WESTERN RAILWAY CO. v. CRAMER, ADMX., ET AL.**

Decided, January 29, 1917.

*Negligence—Switchman Guilty of Contributory Negligence—In Stepping from Engine Upon Parallel Track—Without Looking for Approaching Train.*

An employee of one railroad, who is familiar with the tracks and passage of other trains and who steps off the running board of an engine upon which he is riding, immediately in front of an approaching train of another road on adjoining tracks, without first looking to see whether he is safe in so doing, and after a warning of the approaching train has been given by both the engineer of the engine upon which he was riding and of the other train, is guilty of contributory negligence.

*Hollister & Hollister*, for plaintiff in error.

*Fred J. Oeltmann; Littleford, James, Ballard & Frost and Maxwell & Ramsey*, for defendants in error.

JONES, OLIVER B., J.

Heard on error.

The defendant in error Louise Cramer, administratrix, as plaintiff below, recovered a verdict and judgment against the plaintiff in error, which was one of the defendants in the case below. The action was for the benefit of the next of kin of Robert F. Cramer because of an accident which resulted in his death.

Robert F. Cramer was in the employ of The Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, and had been in such employ for at least six years. On the particular morning of the accident he was engaged in switching and making up a train of freight cars west of Beechmont avenue. In that locality the railroad has four main tracks, the two outside being

for passenger trains and the two middle tracks being for freight trains. The Norfolk & Western Railway Company had a trackage agreement with The P., C., C. & St. L. Ry. Company under which it had the use of the tracks of the latter road. The two south tracks carried east-bound trains and the two north tracks carried west-bound trains. To the west of the switch near which Cramer met his death the south tracks curve outwardly in such a way as to admit of a number of spur tracks, which were used for separating freight cars and making up freight trains. The time of the accident was in the neighborhood of nine o'clock on the morning of December 11, 1913, a bright, cold day.

Plaintiff's intestate was engaged, with others of his crew, in making up a freight train, and the engine, just before the accident, having shunted some cars upon the west-bound freight track, was by him switched over on to the east-bound freight track to go forward and pass around such cars and be switched back upon the west-bound freight track. After throwing the west switch Cramer stepped upon the running board or step in front of the pilot of the engine with which he was working, for the purpose of riding upon it to throw the east switch in order to enable the engine to pass over to the west-bound freight track. He stood upon this step or running board until the engine was about at the location of the switch, looking forward to the northwest across the track. While his engine was so proceeding the Norfolk & Western mail train came along the east-bound passenger track on its regular run, at a speed much greater than that of the engine on which Cramer was riding. This speed has been estimated by different witnesses at from twenty to fifty miles per hour, the engineer and conductor on the passenger train fixing it from twenty-five to thirty miles an hour. Just as the freight engine reached the eastern switch, Cramer, without looking backward, stepped off the engine upon which he had been riding, and was immediately struck by the pilot of the passenger engine on the track alongside and was thrown in the space between the two tracks and picked up dead.

The allegation of negligence in plaintiff's petition is stated in the following terms:

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"The defendant, the Norfolk & Western Railway Company through its agents and servants failed to sound a bell, whistle or warning, as it rounded the curve and approached decedent, and the fireman on said engine failed to keep a proper lookout at all at this particular point and time, and left his post and failed to ring his bell or give warning or signal of the approach of his train, although the engineer, on account of the length of the engine, could not see the point near the track where decedent was; that said train was late and was proceeding at a high and dangerous rate of speed, to-wit, forty miles and hour, and could not be stopped until it had gone eight hundred feet beyond the point where decedent was struck."

The defendant Norfolk & Western Railway Company in its amended answer states its defense and allegations of negligence against the plaintiff's decedent in the following language:

"That plaintiff's decedent placed himself in a dangerous position by alighting from an engine of the defendant, The Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company upon or so near the track upon which the defendant Norfolk & Western Railway Company was operating its train as to be struck by the same, and before thus placing himself in a dangerous position he failed to look and listen to ascertain if a train of the said defendant Norfolk & Western Railway Company were approaching; that before alighting from said engine, he did not heed the danger signals warning him of the approach of a train of said defendant Norfolk & Western Railway Company, which signals were given by the blowing of the engine whistle by the engineer of the defendant, The Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, upon which engine decedent was riding; that the decedent alighted from the said engine next to the track which the train of the said defendant Norfolk & Western Railway Company was approaching, when, in the reasonable and proper performance of his duties, he should and could have alighted from the other side of said engine; that decedent failed to heed the warning of the bell which was being rung by the fireman of the engine of the said defendant Norfolk & Western Railway Company."

The evidence shows that as Cramer leaned out preparing to step off, the engineer of the freight engine noticing the approach of the passenger train gave what is known as a danger

signal with his whistle, being a succession of short sharp blasts, for the purpose of warning Cramer of his danger, but that Cramer apparently paid no attention to the warning, and did not look around or realize the approach of the passenger train. This passenger train ran daily along that track, at the same hour every morning, and on this occasion it was a few minutes late. The deceased had worked in that locality for some little time and was undoubtedly familiar with these facts.

While one of the allegations of negligence of the defendant company was that the fireman failed to keep a proper lookout, the evidence shows that he had not been negligent in that respect, and had kept a continuous lookout, except when, the engineer having shut off the steam from the passenger engine because of a green light shown at a signal station just before they reached the point of the accident, his duty required him to reach down and open the fire door and a blower valve in order to kill the smoke of the engine, which required but a few seconds.

The testimony also shows that the engineer of the passenger train gave the usual crossing whistle for Beechmont avenue at the regular point some little distance west of the accident, and that the bell of his engine was constantly ringing up to the time of the accident. There were witnesses, however, who testified that they did not remember whether or not the bell was rung, and that they had not heard it.

It is not necessary to determine whether or not a case of negligence was made out against the defendant; because the evidence clearly shows that plaintiff's intestate was guilty of negligence in stepping from the running board as he did immediately in front of the approaching passenger train without first looking to see whether he was safe in so doing. A proper course, which could easily have been pursued by him, was to have moved across the running board of his engine and to have stepped off from its left side, upon the freight track, where there could have been no possibility of being struck, and where he would have been nearer to the switch he was about to throw.

The trial court, in its opinion overruling motion for a new

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trial, after discussing the evidence as to the negligence of plaintiff's intestate, arrived at this conclusion:

"It seems to the court that there can be but one inference from these circumstances, namely, that the deceased was guilty of a want of ordinary care—negligence—in alighting as he did from his engine."

But notwithstanding this conclusion of the trial court he sustained the verdict in favor of the plaintiff, and entered judgment thereon under what is known as the doctrine of "last chance," as laid down in the cases of *Railroad Co. v. Kassen*, 49 Ohio St., 230, and *L. S. & M. S. Rd. Co. v. Schade, Admr.*, 15 C. C., 424, and in 2 Thompson on Negligence, Section 1629, as quoted in *Drown v. Northern Ohio Traction Co.*, 76 Ohio St., 234, at page 247.

We think that the court below was in error in resting its decision upon this doctrine of last chance, in which he felt sustained by the cases of *Steubenville & Wheeling Traction Co. v. Brandon*, 87 Ohio St., 187; *West, Recr., v. Gillette*, 22 C. C. (N. S.), 369, and *Greve v. Cincinnati Traction Co.*, 21 C. C. (N. S.), 231, 2 Ohio App., 486. These three cases related to street traffic, and did not involve the doctrine of last chance, and can not control the case at bar.

It was conceded by all of the witnesses that after plaintiff's intestate had left the place of safety on the running board of his own engine, and put himself in a place of danger in front of the approaching passenger engine, it was impossible for the engineer or brakeman on the passenger train to have done anything to avoid the injury. The engine already had the steam off for the purpose of slowing up to be under control for the block signal which they expected at Rendcomb Junction, and yet was running at such a rate that it was impossible to stop or in any way signal Cramer to prevent the accident. He had received the signal from his own engine whistle and had failed to observe it. There can be no question but that his own negligence caused his unfortunate death. *Wabash Rd. Co. v. Skiles*, 64 Ohio St., 458, and *Bejac v. C., P. & E. Ry. Co.*, 23

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Conservancy District v. Mitman.[§1 O.C.A.]

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C. C. (N. S.), 475, are cases which involve the same principle of law.

The verdict of the jury is clearly against the manifest weight of the evidence, and the motion for a new trial should have been granted by the court below.

Judgment reversed, and cause remanded.

JONES, E. H., P. J., and GORMAN, J., concur.

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**AS TO THE LATITUDE TO BE ALLOWED COUNSEL  
IN ARGUMENT.**

Court of Appeals for Greene County.

MIAMI CONSERVANCY DISTRICT v. MITMAN ET AL.\*

Decided, April 22, 1919.

*Appropriation under the Conservancy Act—Three-fourths Jury Verdict Valid—Misconduct of Counsel—Discretion of Court.*

1. The statute which provides for the rendering of a verdict by the concurrence of three-fourths of the members of a jury, applies to proceedings under the Conservancy Act, where an appeal has been taken from the award of the appraisers, in an action to appropriate real estate for conservancy purposes.
2. The latitude allowed counsel in the argument of a case rests to a certain extent in the direction of the trial court, and when the record does not affirmatively and clearly show that the trial court abused its discretion in that respect a reviewing court is not justified in granting a new trial upon the ground of misconduct of counsel.

*McMahon & McMahon, O. B. Brown, M. A. Broadstone, J. K. Williamson and Morris D. Rice, for plaintiff in error.*

*Marcus Shoup and H. D. Smith, for defendants in error.*

KUNKLE, J.

Heard on error.

This is an action wherein plaintiff in error seeks to appropriate certain real estate belonging to defendant in error, O.

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\*Affirmed by the Supreme Court, July 8, 1919.

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F. Mitman, for the purpose of making certain improvements under the Conservancy Act of Ohio (104 O. L., 13). It appears from the petition that the property in question was appraised in the conservancy proceedings at \$7,500.

Defendant in error, O. P. Mitman, the owner of the property, excepted to such appraisement. His exceptions were overruled by the conservancy court and he then appealed to the court of common pleas of Greene county, under Section 34 of the Conservancy Act (Sec. 6828, G. C.). Trial was had in the court of common pleas of Greene county and the jury returned a verdict in favor of defendant in error in the sum of \$8,500. The verdict was signed by ten members of the jury.

Motion for a new trial was overruled, judgment was entered upon the verdict, and from such judgment plaintiff in error prosecutes error to this court.

Counsel for plaintiff in error insist that the trial court erred in instructing the jury that they might return a verdict by the concurrence of nine or more members of the jury, and also erred in accepting the verdict which was signed by only ten members.

It is claimed that while the Constitution, Art. I, Sec. 5, as amended, authorizes the enactment of a law for the rendering of a verdict by the concurrence of not less than three-fourths of the jury, in civil cases, nevertheless, the Legislature by the enactment of Section 11455, G. C., only extended the authority for rendering a verdict by the concurrence of three-fourths of the jurors to civil actions.

Section 34 of the Conservancy Act provides that an appeal from the award of the appraisers as to compensation or damages shall be filed in the court of common pleas in the county in which the lands sought to be appropriated are stituate, and that the proceedings shall be in accordance with the statute regulating appropriations by other than municipal corporations.

While the appeal of the landowner from the appraisal is taken to the court of common pleas, nevertheless the procedure in that court is required to be in accordance with the statutes governing appropriations in the probate court (Part Third, Title 3, Chapter 5).

It is urged by counsel that a condemnation case of this nature is a special proceeding and not a civil action.

Counsel for plaintiff in error rely upon the case of the *Pittsburgh, C. & T. Ry. v. Todd*, 72 Ohio St. 156 [74 N. E. 172] and *Dayton & U. Ry. v. Dayton & M. Trac. Co.*, 4 C.C.(N.S.) 329, affirmed by the Supreme Court, 72 Ohio St., 644.

If it be conceded that the appeal provided in Section 34 of the Conservancy Act is a special proceeding, rather than a civil action, nevertheless Sec. 11048 G. C. provides that:

"The owners of each separate parcel, right, or interest, are entitled to a separate trial by jury, verdict, and judgment. They shall hold the affirmative on the trial, which must be conducted, evidence admitted, and bills of exceptions allowed as provided in civil actions."

This section of the code, by reference, makes applicable the procedure in civil actions.

The case of *Niemes v. Niemes*, 97 Ohio St. 145 [119 N. E. 503], involved the contest of a will.

The code denominates actions of that character as civil actions, and the Supreme Court says, in *Niemes v. Niemes*, at page 160, "That such proceeding is a civil action is not a debatable matter."

While the statute in question does not expressly denominate appropriation proceedings as civil actions, yet such cases are controlled by the procedure in civil actions, and we think the decision in the Niemes case is applicable to the case at bar.

It is also claimed that Sec. 11058 G. C., which provides that the verdict shall be signed by the foreman of the jury, essentially preserves, at least by inference, the unanimous verdict. We think that Secs. 11058, 11048 and 11455 should be read and construed together.

We are of opinion that Sec. 11058, which goes to the form of the verdict, is not inconsistent with the statute providing for a three-fourths verdict.

It is true the three-fourths jury law does not by its terms apply to the probate court, but the probate act, by reference to

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the procedure in civil actions, would make the statute in regard to the three-fourths jury part of the probate code, in so far as the same applies to appropriation cases.

In this case the verdict was signed by ten members of the jury and we think that constitutes a substantial compliance with the statute.

We are supported in this view by the decision of the court of appeals of the fifth district, in the case of *Smith v. Craig*, 9 Ohio App., 316; 29 O. C. A., 236.

Objection is also made that the testimony of the witness Owens was not ruled out.

This witness clearly qualified upon his direct examination. (Page 18 of the record.) The admissions of the witness on cross-examination did to some extent discredit his testimony given on direct examination as to his qualification to express an opinion upon the value of the property. We think the cross-examination merely reflected upon the credibility of the witness, and the credibility of a witness is a question for the consideration of the jury. We do not think his testimony is incompetent.

It is also urged that one of counsel for defendant in error was guilty of misconduct in the closing argument to the jury. The record does not contain the remarks made by counsel for plaintiff in error. We are therefore not advised as to whether the remarks complained of were or were not provoked by anything which counsel for plaintiff in error may have stated to the jury. The rule governing reviewing courts in this respect is well stated in the case of *Ohio & Western Pennsylvania Dock Co. v. Trapnell*, 88 Ohio St. 516 [103 N. E. 761], in the opinion of which the court say, at page 521:

"Remarks of this kind are wholly improper in the trial of a case and it is the duty of the trial court to see that they are not made, or at least not persisted in, but something must be left to the discretion of a trial court, otherwise we would never reach an end to litigation, and a reviewing court ought not to reverse unless it clearly appears that such misconduct was of such character and so persistent as to prevent a fair trial of the cause. While this court will sustain a trial court in compelling counsel to properly conduct their cause and to refrain from all side re-

marks and unprofessional conduct, either by directions to the jury to disregard these remarks and the punishment of counsel if they persist in offending, or by granting a new trial therefor, yet it will not reverse the judgment until it clearly appears that such conduct was prejudicial to the losing party."

Applying the above rule to the case at bar we are of opinion that the record does not show such a state of facts as would justify this court in reversing the judgment of the lower court on the ground of misconduct of counsel in the closing argument.

We have carefully considered all of the errors urged by counsel for plaintiff in error, but finding no error in the record which we consider prejudicial to plaintiff in error the judgment of the lower court will be affirmed.

Judgment affirmed.

ALLREAD and FERNDING, JJ., concur.

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**AUDITOR'S CERTIFICATE NECESSARY TO VALIDATE CONTRACT  
FOR A PUBLIC BUILDING.**

Court of Appeals for Licking County.

**KNOWLTON & BREINIG v. THE BOARD OF EDUCATION OF THE VILLAGE OF JOHNSTOWN.\***

Decided, 1920.

*Clerk's Certificate When Bonds are Lawfully Authorized—Sections 5660 and 5661 Construed—Restrictive Statutes to be Strictly Construed.*

1. Under the provisions of Section 5660 of the General Code, when money for a public building is to be derived from the sale of lawfully authorized bonds, a contract for such improvement, or any part thereof, is void unless the auditor or clerk of the board first certifies that the money required for the payment of such obligation or appropriation is in the treasury to the credit of the fund from which it is to be drawn.
2. Where there is only one bond issue authorized, but several separate contracts are entered into with separate contractors, the auditor or clerk must file a separate certificate for each of such contracts.
3. The restrictive statutes of the state are enacted for the general good, and for the protection not only of the contractor but also of the tax-payer, and their provisions will be strictly adhered to, and it devolves upon those who deal with public officials to see for themselves that the statutes have been complied with.

*Jones & Jones, for plaintiff in error.**Chas. L. Flory, Pros. Atty., for defendant in error.***PATTERSON, J.**

Heard on error.

The parties in this case stand in the same order in which they stood in the case below. The plaintiff in its petition alleges that it is a partnership doing business in the state of Ohio, that the

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\* Motion for an order directing the Court of Appeals to certify its record in this case overruled by the Supreme Court, June 17, 1920.

defendant in the year 1913, by resolution duly passed, declared it necessary to construct an addition to its then existing school building in the village of Johnstown, and to provide a new heating and ventilating system for its then existing building as well as for the new addition; that notice was given for four consecutive weeks in a newspaper of general circulation in said school district. That plaintiff thereupon submitted to defendant its proposal to furnish the material and to perform the labor necessary to make such improvements, except the heating and ventilating system; that on the 11th day of July, 1913, plaintiff's proposal was submitted to said board and was declared to be the lowest and best bid for furnishing material and labor for the said work, and was accepted by the defendant, and notice of such acceptance immediately served by defendant upon plaintiff who accepted service of said notice and thereupon proceeded to enter upon the work of making said improvements covered by its said proposal. That it entered into a bond in the sum of \$8,000 conditioned according to law which was approved by the defendant. That the defendant prepared, and presented to plaintiff, a written memorandum which plaintiff signed, providing for the construction of said addition to said school building according to plans and specifications.

Plaintiff says that it has completed that part of the improvement covered by its proposal according to the terms thereof, and according to the plans and specifications, and that the architect has approved such work, or improvement, as constructed by plaintiff, and on the 22nd day of April, 1914, so notified defendant and issued a final estimate to defendant to pay plaintiff the balance due it for making its part of said improvement; that the cost of said improvement was the sum of \$11,549, under the terms of the contract, and that extras in the sum of \$20.20 were furnished by plaintiff, which defendant agreed to pay, making the total amount due plaintiff from defendant the sum of \$11,569.20; that plaintiff has received from the defendant, as part pay for the said improvement, the sum of \$9,479.70, and that there is still due and owing the plaintiff from the defendant a balance of \$2,089.50 with interest from January 15, 1914, for which sum the plaintiff asks judgment.

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A demurrer was filed to this petition which was sustained by the court below. An amendment to the petition was filed, by leave of court, amending plaintiff's petition by inserting between lines 11 and 12 on page three of said petition the following:

"Plaintiff further says that at the time said board of education accepted plaintiff's bid on July 11th, 1913, and at the time plaintiff and defendant signed said written memorandum said defendant had sold for \$16,267.20 the lawfully authorized bonds of said village school district of the par value of \$16,000. Said bonds were sold for the purpose of erecting an addition to the then existing public school building of said village, and to place in said school building, when so enlarged, a heating and ventilating system and to repair the then existing school building and the school grounds. Plaintiff further says that at said last named times, said bonds were in process of delivery; and that there was then an unappropriated balance of said sum of \$16,267.20 sufficient to pay plaintiff the amount due it under its said contract with defendants."

A general demurrer was filed to the amended petition which was sustained by the court, and the plaintiff not desiring to plead further final judgment was rendered against the plaintiff and in favor of the defendant, and to reverse this judgment a petition in error is filed in this court.

The question presented for determination is, Whether it is necessary under the circumstances of this case that the clerk of the defendant board of education should certify that the money required for the payment of the defendant's obligation, under this contract with plaintiff, was in the treasury and unappropriated for any other purpose, in order that the contract might be valid and that plaintiff could collect the contract price?

The statutes relating to public contracts must be strictly adhered to and strictly construed, and it is now well settled that there can be no recovery upon a *quantum meruit*, and that to state a good cause of action against this school board it is necessary that the petition should declare upon a contract, agreement, obligation or appropriation made and entered into according to the statutes.

In support of this we would call attention to the case of *Wellston v. Morgan*, 65 O. S., at page 228:

"There has been no common law implied municipal liability in this state since the passage of the act of April 8, 1876, amending Section 97 of the Municipal Code, 73 O. L., 125, and carried into the Revised Statutes as Section 1693, because that section conflicts with the common law as to such liability, and whenever a statute is in conflict with a rule of the common law, or of equity, the statute must prevail.

Before the passage of that act, there were holdings by this court which seemed to recognize implied municipal liability, notably *Cincinnati v. Cameron*, 33 Ohio St., 336, and since that time there have been some expressions in opinions which seemed to recognize the same implied liability, but in none of those later cases were the provisions of the statute invoked by counsel, or considered by the court; and in the late cases of *McCloud v. Columbus*, 54 Ohio St., 439; *City of Lancaster v. Miller*, 58 Ohio St., 558; *Buchanan Bridge Co. v. Campbell*, 60 Ohio St., 406, and *Comstock v. Nelsonville*, 61 Ohio St., 288, full force has been given to the restrictive statutes of the state, and implied liability denied, and the doctrine established that public officers can incur obligations against those for whom they act, only in pursuance of the provisions of the statutes, and that they can not deal upon the *quantum meruit*, or reasonable value plan. With these holdings we are content.

A strict adherence to the provisions of the restrictive statutes of the state will be for the general good; and it devolves upon those who deal with public officers, to see for themselves that the statutes have been complied with.

There being no implied municipal liability in cases *ex contractu*, under our restrictive statutes, it follows that to state a good cause of action against a municipality in such cases, the petition must declare upon a contract, agreement, obligation, or appropriation made and entered into according to statute. A petition on an account merely or *quantum meruit*, in such cases, is not sufficient."

The question presented in this case involves the construction of Sections 5660 and 5661, General Code, which are as follows:

"Sec. 5660. The commissioners of a county, the trustees of a township and the board of education of a school district, shall not enter into any contract, agreement or obligation involving the expenditure of money, or pass any resolution or order for

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the appropriation or expenditure of money, unless the auditor or clerk thereof, respectively first certifies that the money required for the payment of such obligation or appropriation is in the treasury to the credit of the fund from which it is to be drawn, or has been levied and placed on the duplicate, and in the process of collection and not appropriated for any other purpose; *money to be derived from lawfully authorized bonds sold and in the process of delivery shall, for the purpose of this section, be deemed in the treasury and in the appropriate fund.* Such certificate shall be filed and forthwith recorded, and the sums so certified shall not thereafter be considered unappropriated until the county, township or board of education is fully discharged from the contract, agreement or obligation, or as long as the order or resolution is in force."

"Sec. 5661. All contracts, agreements or obligations, and orders or resolutions entered into or passed contrary to the provisions of the next preceding section, shall be void, but such section shall not apply to the contracts authorized to be made by other provisions of law for the employment of teachers, officers, and other school employees of boards of education."

The words in italics in Section 5660 will not be found in the section prior to its last amendment March 29, 1910 (101 O. L., 37). Similar provisions of the General Code relating to municipalities will be found in Sections 3806 to 3810, inclusive. Sections 3806, 3807, 3808 and 3809 were originally in one section and were Section 45 of the Municipal Code found in 86 O. L., 37, and this section was carried into Bates' revision of the Revised Statutes as Section 1536-205. Section 3806 is substantially the same as Section 5660 omitting the words in italics. Section 3807 is substantially the same as 5661; Section 3809, as amended, 103 O. L., 526, provides for certain exceptions to the limitations of 3806; Section 3810 reads as follows:

"Money to be derived from lawfully authorized bonds or notes sold and in process of delivery, shall for the purpose of the certificate that money for the specific purpose is in the treasury, be deemed in the treasury and in the appropriate fund."

Section 3810 was first enacted March 21, 1904, 97 O. L., 44, and was then designated as Sections 45a and was carried into Bates' revision of the Revised Statutes as Section 1536-205a.

It will be observed that about the only difference in the statutes relative to the certificate and relative to the sale of bonds is that these provisions are all embodied in Section 5660 in relation to the boards and officers therein mentioned, while as regards municipalities the provisions are in two Sections 3806 and 3810.

It is contended on the part of the plaintiff in error that inasmuch as the defendant in error sold bonds for the contemplated improvement the certificate of the clerk was not necessary.

This certificate has a two-fold purpose not only to protect the contractor by indicating the amount of money which has been appropriated for the fulfillment of his contract, and of which he is bound to take notice, but for the larger purpose of protecting the general public and taxpayers from extravagant and unwarranted expenditures of money for which no provision has been made by sale of bonds, taxation or otherwise.

In *Carthage v. Diekmeier*, 79 O. S., at page 341 the court say:

"Whatever may be the correct view as to the meaning of this statute where a single contract is let, it seems to be a reasonable construction that there be a definite sum certified for each contract where there are several of the same species entered into at the same time to be paid from a theretofore gross fund. It would seem conducive, if not necessary to the safety of each contractor, that a definite sum be certified, because it is on the performance of that act by the village clerk that money to discharge the obligation is set apart and appropriated, and which 'shall not thereafter be considered unappropriated,' etc. The two branches of the section must be construed together and when so construed, the entire section given its proper operation. Governed by this rule, we can not say that the original certificate in question was drawn in compliance with said statute, and while in case of a single contract in contemplation, to be satisfied from a single fund, such a certificate might be sufficient (but we do not so decide), it is quite clear to us that when the statute is to be applied to the subject matter where several different streets are to be improved for which purpose separate contracts are let on different separate bids, the certificate should contain a specified sum set apart for each of such contracts. Such must have been the construction entertained in the Linden avenue contract, or rather the resolution authorizing the con-

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tract, for the jury found (No. 8) that when the resolution had been read, the solicitor made the objection that the certificate of the clerk contained no specified amount for the improvement of Linden avenue, whereupon the engineer gave the clerk the amount to be inserted for that avenue, and it was placed on the face of the certificate in figures, and after that the resolution was adopted. These acts of the engineer and clerk can not be safely discarded by the contractor, for in doing so, he must rely on a document which was not drawn in compliance with law, and his whole claim would be illegal and void. Under the facts of this case as to the nature and number of contracts awarded at the same time, the original certificate did not conform to the statute, and the contractor would be without remedy. But with the figures added to the face of the instrument \$2,030 was the sum certified and to that extent the village set apart from the gross fund the amount to cover the Linden avenue improvement. We are told this amount has been paid before suit was brought, and the suit is to recover \$2,260 in excess of that amount."

And again at page 345 the court say:

"Moreover, it was not within the power of the council or the village engineer to increase the liability of the corporation beyond the amount for which the certificate had been filed and thereby nullify Section 2702. That would be striking down rather than obeying the statute. No mere final estimate of the engineer, no matter if it is correct in its terms, can increase the corporate liability, neither did the acceptance of the work by the public authorities accomplish that result. If the contractor found he was deceived by the estimate as to quantities and work, and that the improvement could not be made on such terms, he should have acted promptly and had legal and proper action taken to relieve the dilemma rather than proceed blindly or willingly, expecting that the law and action of council would be relaxed so he could get full compensation by putting another and unexpected burden upon the taxpayers.

"No longer can it be said that the contractor need not look to the legal phases of his negotiations with a municipal corporation. He must be active in protecting himself. This doctrine was announced in *McCloud & Geigle v. City of Columbus*, 54 Ohio St., 439; and clearly stated in *Lancaster v. Miller*, 58 Ohio St., 558. It is there held, not only that the terms of a statute regulating the execution of a contract whereby public money will be expended, must be followed, but where the statutory requirements have been omitted, the corporation will not by the

acts of its officers be estopped to set up such omissions as a defense to an action brought against it on such contract. The strictness of the rule is justified in the opinion of the court on page 575. Among other things, it is there said: 'Contracts made in violation of these statutes should be held to impose no corporate liability. Persons who deal with municipal bodies for their own profit should be required at their peril to take notice of limitations upon the powers of those bodies which these statutes impose.'

In the above case it will be observed that contracts were let for an amount largely in excess of the proceeds of the bonds; that there was one bond issue and a number of separate contracts let for the contemplated improvements.

In the case at bar there was one bond issue and the plaintiff bid only for a part of this work. True its bid is within the bond limit, but the record does not disclose whether all of the bids were within the bond limit or not, nor does it disclose what the estimate or what the contract was for the heating and ventilating of this building. And where there is a single bond issue and different contracts are let for different parts of the improvement we hold that it is a condition precedent and the duty of the clerk to file and record his certificate covering each of these separate contracts and the contractors are bound to take notice at their peril that a sufficient amount of money is in the treasury, and duly certified, to provide sufficient funds for the payment of the money due them.

Our attention has been called to the case of *Akron v. Dobson*, 81 O. S., 66, and the third syllabus of that case is as follows:

"Section 1536-205, Revised Statutes, providing that no contract, agreement or other obligation involving the expenditure of money shall be entered into, nor shall any ordinance, resolution or other order for the expenditure of money, be passed by the council or by any board or officer of the municipal corporation, unless the auditor of the corporation shall first certify to council that the money required for the contract, agreement or other obligation, or to pay the appropriation or expenditure, is in the treasury, to the credit of the fund from which it is to be drawn and not appropriated for any other purpose, does not apply to an ordinance appropriating the money obtained by council, from a sale of bonds made by it, to the purpose for which the bonds were sold."

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Our attention has also been called to *Emmert v. Elyria*, 74 O. S., 185, and the second syllabus in that case is as follows:

"Sections 45 and 45a of the municipal code (1536-205 and 1536-205a, Revised Statutes, Bates 5th Ed.), providing in substance that no contract involving the expenditures of money shall be entered into unless the auditor of the corporation shall first certify to council that the money required for the contract is in the treasury to the credit of the fund from which it is to be drawn and not appropriated for any other purpose and that a contract entered into contrary to such provision shall be void and that the money to be derived from lawfully authorized bonds or notes sold and in process of delivery shall be deemed in the treasury and in the appropriate fund, do not apply to contracts for street improvements, when bonds have been authorized by the municipality to be issued to pay the entire estimated cost and expense of the improvement."

It is somewhat difficult to harmonize or distinguish the three cases cited above.

In *Akron v. Dobson*, at page 77, the court say:

"It is also contended that the contract is void because the auditor did not certify to the council that the money required for the contract was in the city treasury as prescribed by Section 1536-205, Revised Statutes. The supplemental petition avers that the auditor did not so certify. This is denied by the answer in the circuit court, and that court does not make any finding upon that issue."

So that in this case the question does not seem to have been decided by the circuit court. The petition averring that the auditor did so certify, which averment was denied in the answer and the circuit court making no finding upon this issue.

*Emmert v. Elyria* was an injunction suit seeking to enjoin the city of Elyria from paying the balance due on a paving contract. The certificate of the auditor of the city that the money necessary for said improvement was in the treasury to the credit of the proper fund and unappropriated for any other purpose was filed with the clerk of the council, and also in the office of the board of public service of said city on the same day and immediately before said contract was let. At page 194 the court say:

"But, because a municipality is not legally liable to pay for a public improvement, it does not follow that it is not under a moral obligation to do so or that a court because it will not enforce payment will enjoin it. The contract for paving this street is not *ultra vires*. If invalid it is merely so because the contract was made before the bonds to provide the money to pay for it were sold. Now that the work has been done in accordance with the contract and the bonds have been sold and the money to pay for it is in the treasury, it is right that it should be paid for and a court of equity ought not, unless its failure to do so would defeat the purpose of the law, prevent the municipality from doing what equity and fair dealing would exact from an individual."

And the third finding by the circuit court on page 189 is as follows:

"At the time said certificate was filed there was no cash in the proper fund and unappropriated in said treasury for said improvement, but bonds of said city wherewith to provide such cash, had been duly authorized. Said bonds had not been sold nor were there any notes of said city then sold and in process of delivery, and said facts were all well known to all the defendants; who, however, in good faith, and pursuant to the advice of the solicitor of said city, proceeded with said improvement, believing that their proceedings were lawful."

So that the real question in this case seems to have been not that a certificate was not filed, but that the contract was invalid because the contract was let before the bonds were sold for the improvement.

In *Carthage v. Diekmeier* a certificate and an amended certificate were duly filed and the contract then executed and that the amended certificate is a limitation on the amount to be paid on the contract for the street, beyond which the corporation is not liable to the contractor; that in *Emmert v. Elyria* a certificate was filed but was filed before the bonds for the improvement were sold. So that in both of the above cases certificates were filed and recorded, and in the case of *Akron v. Dobson* there was an allegation that the certificate was filed, which was denied by the answer and no finding was made by the court upon the issue thus joined.

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In the case at bar it is shown by the pleadings and conceded in the argument that no certificate whatever was filed or recorded or attempted to be filed or recorded, the contractor relying solely upon the fact that bonds of the school district had been sold and were in the process of delivery in the sum of \$16,267.20 a sum sufficient to pay plaintiff its contract. The pleadings show that there was one bond issue for the entire contemplated enlargement and improvement of the school house, but that the plaintiff did not enter into a contract for all of the contemplated improvements. The contract for the heating and ventilating was a separate and distinct contract and the record does not disclose the amount of this contract or whether there were any further contracts to be entered into in order to complete the improvements.

This decision may seem somewhat harsh and technical, but courts do not make the laws. Their duty is to interpret them as they find them; and it is important that public officers as well as contractors should be familiar with their powers and duties and rights and liabilities under the section herein construed.

The amendment to Section 5660 as found in 101 O. L., 37 was certainly made for some purpose and in construing this purpose we hold that the intention of this amendment was to require the clerk, or other proper officer, to make a certificate that the money was in the treasury when bonds were sold and in the process of delivery—the money not being actually but constructively in the treasury; that the object of this amendment, as claimed by the plaintiff in error, was not to dispense entirely with a certificate by such officer when bonds were sold, keeping in mind the fact that the object of the entire section is for the protection of the contractor and the general public. Entertaining these views the judgment of the court of common pleas in sustaining the demurrer to the petition and the amendment to the petition and in rendering final judgment will be affirmed.

Judgment affirmed.

HOUCK, P. J., and SHIELDS, J., concur.

**VACATION OF A DEFAULT JUDGMENT NOT A FINAL ORDER.**

Court of Appeals for Cuyahoga County.

**HIGINBOTHAM V. ATWATER.**

Decided, October 24, 1919.

*Final Order—Granting of Motion to Set Aside a Default Judgment—Not a Basis for Prosecution of Error.*

The granting by the trial court of a motion to vacate a default judgment at the same term in which the judgment is rendered, when the motion is filed within three days after the rendition of the judgment, is not a final order from which a proceeding in error may be prosecuted.

*Stearns, Chamberlain & Royon*, for plaintiff in error.

*Lamb, Vaughan & Lamb*, for defendant in error.

DUNLAP, P. J.

Heard on error.

Plaintiff in error, who was plaintiff in the municipal court, secured a default judgment in an action brought upon a promissory note. This judgment was obtained in the January term; to be exact, it was obtained on February 3, 1919, a day of said term. On the next day, being also a day in said term, the defendant filed a motion to vacate the judgment, and an affidavit in support thereof; and upon February 15th, being also a day in said term, the court granted the motion and set aside the judgment.

To this action of the court the plaintiff excepted and filed his petition in error in this court to reverse the ruling of the municipal court vacating the judgment, and to be restored to all things he had lost by reason of said ruling, which, of course, means the restoration of the judgment so vacated. In support of his contention we are cited to Sec. 11637, G. C., which provides that "a judgment shall not be vacated on motion or petition until it is adjudged that there is a valid defense to the

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action in which the judgment was rendered," and as construing this section favorably to his contention we are cited to a decision of the court of appeals of Hamilton county in the case of *Cincinnati v. Archiable*, 21 C. C. (N. S.), 582 (4 Ohio App., 218), the first paragraph of the syllabus of which is as follows:

"A trial judge is without discretion, in the face of a rule of court and the provision of Sec. 11637, to set aside a default judgment, even during the term at which it was rendered, without first requiring the defendant to show a valid defense and forthwith set it up before an order is made setting the judgment aside."

In the case at bar the affidavit offers an excuse for failure to file an answer (or statement of defense, as it is styled in that court), but does not show the existence of any actual defense, and certainly there was no adjudication of the existence of a valid defense, and it must be conceded that if the case just cited is to be distinguished at all, it must be only in fact that in it an interval of eleven days elapsed between the rendition of the decree and the filing of the motion to vacate, while in the case at bar the motion was filed on the day following the rendition of the judgment. If it were not for this distinction, the case just cited would be a precedent for granting the relief prayed for here, and, if good law, would be decisive, although we have generally adhered to the opinion that during the term at which a judgment was rendered the court rendering the same had full control over its docket and could set aside, change or vacate its judgments and orders in the exercise of a sound legal discretion. Our own adherence to this doctrine is shown by the opinion in Washburn, J., in the cases of *Kornick v. Hahn, Admx.*, 30 O. C. A., 591, and *Wybel v. Sheaffer, post*, ——, and would appear to be further justified by a consideration of the cases of *Huntington & McIntyre v. Finch & Co.*, 3 Ohio St., 445; *Knox County Bank v. Doty*, 9 Ohio St., 505; *Niles v. Parks*, 49 Ohio St., 370; *Van Camp v. McCulley, Tr.*, 89 Ohio St., 1, 8; *Seelbach v. Craft*, 21 C. C. (N. S.), 158; *Huber Mfg. Co. v. Sweeny*, 57 Ohio St., 169, and *Mercer Co. (Comrs.) v. Deitsch*, 94 Ohio St., 1.

The foregoing citations will, we think, be sufficient for the purposes of this opinion, although many others could doubtless be discovered.

It is not to be denied that the provisions of Sec. 11637, G. C., give some justification for the opinion of the Hamilton county court of appeals in *Cincinnati v. Archibale, supra*, which opinion is completely destructive of this very prevalent belief in the inherent power of courts over their judgments and orders during the term. It is not essential, however, for the purposes of this opinion, to enter into a discussion of such inherent right, however desirable it might be to have the matter again freshly settled. It is sufficient to say that the question presented by this petition in error seems to have very recently come to the attention of our Supreme Court as evidenced by the *per curiam* opinion in the case of *Continental Trust & Savings Bank Co. v. Home Fuel & Supply Co.*, 99 Ohio St., 453, which states:

"The motion to vacate the judgment rendered in the common pleas on a cognovit note upon warrant of attorney and without summons or notice was filed the day following the rendition of the judgment and during the same term. The lower courts, therefore, were right in considering it as a motion for a new trial, filed within the time prescribed by law. The action of the trial court sustaining such motion does not constitute a final order from which a proceeding in error may be prosecuted."

It would appear to us, then, that the motion in the case at bar must also be regarded as a motion for a new trial, which is "filed within the time prescribed by law," and that the action of the trial court in sustaining the motion was not a final order from which a proceeding in error can be prosecuted.

This conclusion, of course, disposes of the case, and requires us to dismiss the petition in error.

Our entry will be "petition in error dismissed."

WASHBURN and VICKERY, JJ., concur.

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**MEASURE OF DAMAGES FOR INJURY TO A BUSINESS AUTOMOBILE.**

Court of Appeals for Hamilton County.

**MAYER v. COHN.**

Decided November 3, 1919.

*Damages—Injury of Chattel by Tort of Another—Entitles Owner to Compensation for Loss of Use.*

The proper measure for damages against one who wrongfully injures the automobile of another, which is used for business purposes, includes compensation for the loss of use during the time necessarily expended in making the repairs.

*Robertson, Buchwalter & Oppenheimer*, for plaintiff in error.

*Robert P. Goldman and Murray Seasongood*, for defendant in error.

**SHOHL, P. J.**

Heard on error.

Plaintiff in error, Jesse C. Mayer, brought suit against the defendant in error, Arthur Cohn, in the municipal court of Cincinnati for damages caused in a collision between the automobiles of the parties. The defendant in error, who was the defendant in the original action, filed a cross-petition for the damages caused to his automobile, alleging the cost of his repairs to be \$6.98, and also claiming damages for the loss of the use of his machine for the time expended in making the repairs. The jury returned a verdict in favor of the defendant and against the plaintiff in the sum of \$81.98, and judgment was entered thereon. This was affirmed by the court of common pleas, and it is now sought to reverse both judgments.

The principal error complained of is that the court permitted the defendant to recover damages for the loss of the use of the automobile. The automobile in question was a touring

car, used by the defendant in his business to call on the trade. He did not hire another machine for the three days that it was in the repair shop. The weight of authority and the better reasons support the rule allowing compensation for the loss of use during the time necessarily expended in making repairs.

The primary end to be attained in the awarding of damages for torts is to put the injured person in as good a position as he would have been if the tort-feasor had not injured him. If one is wrongfully deprived of the use of a chattel through the tort of another, the proper measure of damages includes compensation for the loss of use proximately caused by the tort. There is no good reason why the injured party should be required to hire another chattel in order to establish the value of the use. If that use is valuable it can be shown by evidence, like any other question of fact. The statement of the rule in Sedgwick on Damages (8 Ed.), Sec. 435, which was approved by the court in the case of *Pittsburgh, C., C. & St. L. Ry. v. Kelly* (12 C. C., 341; 5 Circ. Dec., 662), affirmed 53 Ohio St., 667, is:

“Where the plaintiffs property was injured, he may recover the expense of restoration of the property to health or soundness, compensation for the loss of use of it during the period of disability, and the amount of the difference, if any, between its value before the injury, and after the cure or repair.”

See also *Loud & Sons Lumber Co. v. Peter* (20 C. C., 73; 11 Circ. Dec., 155); and *Cook v. Packard Motor Car Co.*, 88 Conn., 590, and note to same, L. R. A., 1915C, page 319.

The trial court did not err and the judgment will be affirmed.

HAMILTON and CUSHING, JJ., concur.

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**DEFENSES OF A CORPORATION AGAINST AN UNCANCELED  
OUTSTANDING STOCK CERTIFICATE.**

Court of Appeals for Hamilton County.

**JOHN N. RUSSELL, ADMINISTRATOR OF THE ESTATE OF J. N.  
RUSSELL, VS THE FOURTH NATIONAL BANK.\***

Decided, March 15, 1920.

*Corporations—Transfer of Stock without Surrender of Old Certificate—Action to Compel Issue of New Certificate to Administrator of Original Holder—Application of Statute of Limitations—As to Claim for Back Dividends and as to Compelling Issue of New Certificate—Nature of an Appeal under the Ohio Law—Findings of Fact in Error Proceeding not Authorized—Meaning of the Phrase “Law of the Case”—Laches.*

1. Under the system of appeals in Ohio, the case is not presented on the record as made up in the court below but there is a new trial on new evidence and pleadings which may be different.
2. The reviewing court is without authority in error cases to make findings of fact on issues as to which there is conflicting evidence or on questions as to which different inferences may be drawn from facts proved.
3. The phrase “law of the case,” as applied to the effect of previous orders on the latter action of the court in the same case, merely expresses the practice of courts generally to refuse to reopen what has been decided. The court has power to redetermine what has been adjudged on a previous appeal or writ of error. But unless the former decision is very clearly erroneous, it will be adhered to.
4. The plaintiff administrator brought an action to require the defendant bank to transfer to him certain stock and for an accounting as to unpaid dividends thereon. The action was based on an uncancelled stock certificate found among the papers of the intestate. The certificate was issued in 1865. Dividends were paid thereon for two years, and were then discontinued, although other stockholders continued to receive dividends during the entire intervening period. The bank claimed that the stock was transferred

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\*Certified by this court to the Supreme Court on the ground of conflict with a former judgment of this court when differently constituted.

to another in 1867, but through some oversight the certificate held by the intestate was not cancelled. With reference to the defense of the statute of limitations—

- Held:* (a) As to the claim for an accounting for dividends the six years statute applies. (b) But in the absence of a preponderance of evidence that the intestate knew of the transfer of his stock to another, the statute of limitations does not terminate his ownership of the stock.
5. The entire failure of the intestate, a man of business experience, a resident of the same city in which the bank was located, and in straitened circumstances during the later years of his life, to take any action regarding his failure to receive dividends, although it was common knowledge that other stockholders were receiving them regularly, renders it inequitable that a suit should be maintained by his administrator, long after all the parties having knowledge of the facts are dead and the records have been lost or destroyed; and the claim for equitable relief is, therefore, held to be barred by laches.

*Tuttle & Ross, for plaintiff.*

*William Worthington and Charles B. Wilby, for defendant.*

SHOHL, P. J.

This case has been before this court on two previous occasions. See 23 C. C. (N. S.). 1, and 26 C. C. (N. S.), 529. See also 15 N. P. (N. S.), 184 and 18 N. P. (N. S.), 585.

The plaintiff, John N. Russell, administrator of the estate of J. N. Russell, deceased, brought an action in the Superior Court of Cincinnati against The Fourth National Bank for equitable relief. The elder Russell in 1865 became the owner of thirty shares of the capital stock of the defendant bank. Dividends were paid to him semi-annually in May and November during that year and the year following, and never afterwards. From that time until the summer of 1889 he resided with his family in Linwood, Hamilton County, Ohio. He then moved to Portland, Oregon, and lived there until his death, June 8th, 1895. As he left no apparent estate, there was no administration. During the summer of 1911, his son, the administrator herein, in looking over some old papers, discovered a certificate for thirty shares of the stock of The Fourth National Bank.

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It had never been cancelled. Later, after his appointment as administrator by the Probate Court of Multnomah County, Oregon, he made demand on the bank for a new certificate and for an accounting for the dividends on the stock since 1866. The bank refused to recognize any ownership of the stock in the decedent or his administrator and this action was accordingly brought in December, 1912.

The stock book of the bank containing transactions prior to 1872 has been lost since 1906, when the bank moved to a new location, but the defendant offered in evidence the stock ledger for the years 1865-1867, the dividend receipt book, and now offer in evidence a certified copy of the report filed with the Comptroller of the Currency of the United States, in accordance with Section 5210 of the Revised Statutes of the United States. The stock ledger is offered for the purpose of showing that Russell disposed of his shares to W. F. Colburn, January 9th, 1867. The dividend receipt book was offered for the purpose of showing that Colburn received the dividends on this stock after that date.

During the period in which Russell resided at Linwood, the evidence shows that he was in reduced circumstances, and he remained poor up to the time of his death.

The judgment in favor of the defendant at the first trial was based upon the finding of the court that the plaintiff is not the owner of the shares of stock represented by the certificate in his possession. This judgment was reversed by the Court of Appeals, which rendered an opinion, holding that the court erred in admitting the stock ledger in evidence. The court, however, said at the conclusion of its opinion:

“In regard to the other defenses alleged in the answer—those of laches and the barring of the action by limitation or lapse of time—we desire to say no more than that none of them seems to us to be of merit to control the conclusions otherwise reached here, and they are denied.”

A new trial was ordered. At the second trial on additional evidence as to the entries, the stock ledger was admitted in

evidence and judgment was again rendered in favor of the bank. To this, error was prosecuted to this court and the case was again reversed. The court in the entry of judgment purported to make certain findings of fact in favor of the administrator. The case was remanded "for such further proceedings in accordance with the above findings as is authorized by law." Application was made to the Supreme Court to direct the Court of Appeals to certify its record and the application was refused.

Pursuant to the mandate of the Court of Appeals, the case was then heard for the third time in the Superior Court, where the defendant made certain admissions as to the market value of the stock and the dividends that had been declared and paid since 1867. The defendant offered proof of its case on the merits but the court rejected it and rendered a decree "that the plaintiff recover from the defendant the sum of twenty-three thousand, six hundred and nineteen and 38-100 (\$23,619.38) dollars" with interest and costs. The defendant then filed an appeal from this decree, and this case is now heard in this court on appeal, as distinguished from error, for the first time.

The plaintiff here offered in evidence proof of the value of the stock and dividends, and rested, maintaining that the law of the case had been established and nothing more remained to be done but to supply what was missing from the facts already conclusively determined in this court. Later the court permitted the case to be reopened and evidence on all the foregoing was offered.

We must determine the effect of the findings contained in the former judgment entry in the error proceedings in this court. But first let us ascertain the nature of an appeal under the Ohio constitution. Appellate jurisdiction in chancery cases is granted by Section 6, Article IV of the amended constitution, and this jurisdiction cannot be enlarged or diminished by statute. *Cincinnati Polyclinic v. Balch*, 92 O. S., 415; *Wagner v. Armstrong*, 93 O. S., 433.

There is no doubt but that the case at bar is a chancery case. An appeal under the Ohio law differs radically from the system of appeals in chancery in England, where the case is presented

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on the record of the trial below. By the Act of February 16, 1810, 1 Chase, 705, 712, it was provided (Section 44):

"That when any cause is removed by appeal into the supreme court, the appeal shall be tried on the pleadings made up in the court of common pleas, unless on good cause shown, and on payment of costs, the said court should permit either or both parties to alter their pleadings, in which case such court shall lay the parties under such equitable rules and restrictions as they may conceive necessary, to prevent delay."

This Section continued in force through the various revisions until the constitution of 1852 was adopted, and it was then continued with the changes made necessary by the substitution of the district courts for the supreme court sitting in the circuit. See 2 Swan and Critchfield, 1161, 1169. When the Code of Practice of 1878 was passed the provision was re-enacted, 75 O. L. 648, Section 65:

"The district court shall have jurisdiction of certain cases, as hereinafter mentioned, by appeal, and the trial therein shall be conducted in the same manner as in the court of common pleas, and upon the same pleadings, unless amendments are permitted or ordered by the court."

That act has been carried forward into the Revised Statutes, Section 5225, and into the General Code, Section 12223, as amended 103 Ohio Laws, 429.

Unlike the English system of appeals, an appeal in Ohio is a new trial on pleadings which may be different, if the court so permits, and upon new evidence. This has been the Ohio practice throughout all of its legal history. See *Grant v. Ludlow*, 8 O. S. 1, 30, and *Mason v. Alexander*, 44 O. S., 318, 327. When the phrase "appellate jurisdiction" in the trial of chancery cases was adopted in the constitution of 1912, there was thereby adopted a phrase already construed, which is taken with its established construction.

The defendant, therefore, is entitled to a trial on the pleadings. What then, is the effect of the so called findings in the judgment entered by this court in the error proceedings the

second time that the case was before it for review! The authorities already referred to establish that the powers of the Court of Appeals are derived solely from the constitutional provision. The court is authorized in error cases to review, affirm, modify or reverse judgments of the lower courts. There is no authority cited which establishes the power to make findings in an error case as to disputed questions of facts or questions from which different inferences of fact may be drawn from the matters proved. The authoritative decisions are that the court must order a new trial on such disputed questions of fact. *Hickman v. Insurance Co.*, 92 O. S., 87; *Minnear v. Holloway*, 56 O. S., 148; *Gay, Extrx v. Davey*, 47 O. S., 396; *Miller v. Sullivan*, 26 O. S., 639; *Emery's Sons v. Irving Nat'l Bank*, 25 O. S., 360; *Stivers v. Borden*, 20 O. S., 232.

We are of opinion, therefore, that the court was without authority to make the findings contained in the judgment of reversal hereinbefore rendered. The right of this court to reconsider and review its own decision in this case is challenged by the plaintiff, and the so called doctrine of "the law of the case" has been urged. It is stated that a prior decision is conclusive upon a subsequent appeal of a case in the same court even if it is erroneous, and that propositions of law once decided by an appellate court are not open for reconsideration in that court upon a subsequent appeal. This subject is treated by note in 1 A. L. R. 1267. The court is of opinion that the better rule is that laid down by the Supreme Court of the United States in *Messenger v. Anderson*, 225 U. S. 436, wherein the court say:

"In the absence of statute the phrase, law of the case, as applied to the effect of previous order on the later action of the court rendering them in the same case, merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power. *King v. West Virginia*, 216 U. S. 92, 100; *Remington v. Central Pacific R. R. Co.*, 198 U. S. 95, 99, 100; *Great Western Telegraph Co. v. Burnham*, 162 U. S. 339, 343."

It is not conducive to the orderly administration of justice that questions of law once decided should be reopened upon

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a reconsideration of the case in the same court, and regardless of the fact that the personnel of the court may have changed, the former decision will be adhered to, unless it is *very clearly erroneous*, as stated in *Platt v. Pennsylvania Co.*, 47 O. S., 366, 379. The reviewing court, however, has the power to re-determine matters adjudged on a previous appeal or writ of error, and may reopen what has been decided.

We are impelled to the conclusion that the making of the findings in question was improper and not within the jurisdiction of the court. Though a court may possess jurisdiction of a cause, of the subject matter, and of the parties it is still limited in its modes of procedure, and in the extent and character of its judgments, and if it renders a judgment which is not within the powers granted to it by the law of its organization, the judgment is void. See *Standard Oil Co. v. Missouri*, 224 U. S. 270, 281, 282, *Works on Courts*, 2nd Ed. Sec. 8; *Windsor v. McVeigh*, 93 U. S. 274, 282, 15 R. C. L. 853, 854. The order to the Superior Court for "such further proceedings in accordance with the above findings as is authorized by law", could mean no more than a simple reversal with instructions to grant a new trial according to law. *Hovey v. Elliott*, 145 N. Y. 126, affirmed, 147 U. S., 409.

In view of our determination that this court has the right to re-examine and reconsider questions already determined herein, we have taken up those matters that have already been discussed in the opinions of this court with great care.

This court has twice held that the ledger offered for the purpose of showing the transfer to Colburn was inadmissible. We are of opinion that this ruling is not so clearly erroneous that it should not be followed at this hearing.

The defendant has set up the defense of the statute of limitations. We will consider its effect separately as to dividends and as to the stock itself. When a corporation properly declares a dividend, it becomes an ordinary debt due stockholders by the company. 2 Machen on Corporations, Section 1357; 2 Cook on Corporations, 7th Ed. Section 542. It is ordinarily stated that such dividend becomes payable on demand, and until demand

and refusal, the dividend is not due the stockholder. In *Larwill v. Burke*, 19 O. C. C., 513, 526, it was held on this principle that until the demand was made, the statute of limitations did not begin to run.

In the case at bar, however, there was a dividend declared, but not to Russell on his stock as he was not a stockholder of record. This fact is shown even without the books of the corporation by the statement which is filed with the Comptroller of the Currency. Indeed the admissibility of this evidence is not a vital question in view of the statement made in open court by counsel for plaintiff that the bank did not treat Russell as a stockholder after 1867. In their brief counsel state "and it is not disputed by the plaintiff that ever since 1867 the Bank has *considered* Russell *not* the owner of the stock." And again: "There is no question in anyone's mind that the bank did not consider Russell the owner of the stock." That Russell was not treated as a stockholder is the foundation of plaintiff's claim for an accounting. If the plaintiff was entitled to dividends, the corporation violated his rights when the dividend was declared by failing to declare a dividend in his favor. A declaration of dividends to stockholders of record does not create the right to bring an action in assumpsit, except by those who are such stockholders. After the declaration of dividends in 1867 and thereafter, there was no money standing to the credit of J. N. Russell and payable on demand. If there was a wrong done to him, it was done each time a distribution of dividends was made without allotting any to him. He had a right of action at that time, and, except as to such dividends arising within six years of the bringing of the action, the statute of limitations is applicable.

In the case of *Stearns v. Hibben Dry Goods Co.*, 11 C. C. (N. S.), 553, the court held that the statute of limitations barred a right of action by a stockholder six years after a dividend was distributed, though he had failed to make demand at that time. His failure to do so did not suspend the operation of the statute of limitations. The decision was affirmed by the Supreme Court in 84 O. S., 470. And see Clark and Marshall on Corporations, Section 527; *Re Severn & Wye Ry.*, L. R. 1 Ch. Div., 559.

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As to dividends more than six years prior to the bringing of this suit the plaintiff is barred by the statute of limitations.

Let us now take up the defense of limitations upon plaintiff's right to the stock as distinguished from the dividends. The relation of a stockholder to his corporation sounds in contract, and his right is in the nature of a chose in action. 1 Morawetz on Corporations, 2nd Ed., Sections 43-45, Section 225; 1 Machen on Corporations, Section 832; *Hawley v. Malden*, 232 U. S. 1, 12; *The Colonial Bank v. Whinney*, L. R., 11, App. Cas., 426, 440, 447, 448.

His contractual right cannot be rescinded without his consent, either express or implied, hence the mere execution of a transfer of his stock on the books, unknown to him, would merely destroy the evidence of the relation, but would not divest him of his rights. It does not constitute a conversion of his stock. 1 Morawetz on Corporations, 2nd Ed., 208; 1 Machen on Corporations, Section 854; *Western Union Tel. Co. v. Davenport*, 97 U. S., 369; *Pratt v. Taunton Copper Mfg. Co.*, 123 Mass., 110. See Note 45 L. R. A. N. S., 1076.

However, when a corporation wrongfully transfers the stock, and the owner knows of its actions, it amounts to a repudiation of the obligation which the corporation owes to him. An express repudiation of such an obligation gives rise to a right of action immediately and starts the running of the statute of limitations against an obligee under no disability to whom such a repudiation is brought home. This is the inferential holding of *Cleveland & Mahoning R. R. Co. v. Robbins*, 35 O. S., 483, 502, where the owner of shares did not know of the transfer. While such knowledge need not be proved by direct testimony but may be shown by the circumstances, we are of opinion in view of all the evidence that actual knowledge on the part of Russell has not been established. While from the facts shown, there are some inferences tending to show that Russell did in fact know of the transfer of his stock, we find no preponderance of evidence to that effect. As to the stock itself, as distinguished from the dividends, the defense based on the statute of limitations must fail.

We shall now consider the question of laches. The court is of opinion that under the unexplained facts shown at the hearing here, the plaintiff is barred by laches and is not entitled to equitable relief against the defendant. During the twenty-eight years from 1867 to 1895, the plaintiff's intestate, though in want, made no effort to assert any rights against the bank. For the first twenty-two years of this period, he lived in Cincinnati. A further period of sixteen years elapsed after his death in 1895 before suit was brought. Laches is such neglect or omission to assert a right as, taken in conjunction with lapse of time and other circumstances, causes prejudice to the adverse party and therefore operates as a bar in a court of equity. *Kemper, Admrs. v. Bldg. Association*, 11 C. C. (N. S.), 372. It is founded upon the evanescent character of all testimony and the consequent difficulty of making a defense to any claim after the lapse of a number of years. See *Douglas v. Corry*, 46 O. S., 349; *Harris v. Wallace Co.*, 84 O. S., 104, 108.

During the period which elapsed all those who were officers of the bank at the time the transfer of the stock was made have died. Russell's delay until his own death deprives the bank of such evidence as he might have been required to give. Important books and records have been lost. These circumstances render peculiarly applicable the doctrine of laches. See *Hanner v. Moulton*, 138 U. S., 486, 495. In *Hammond v. Hopkins*, 143 U. S., 224, 250, the court says:

"No rule of law is better settled than that a court of equity will not aid a party whose application is destitute of conscience, good faith and reasonable diligence, but will discourage stale demands, for the peace of society, by refusing to interfere where there have been gross laches in prosecuting rights, or where long acquiescence in the assertion of adverse rights has occurred. The rule is peculiarly applicable where the difficulty of doing entire justice arises through the death of the principal participants in the transactions complained of, or of the witness or witnesses, or by reason of the original transactions having become so obscured by time as to render the ascertainment of the exact facts impossible. Each case must necessarily be governed by its own circumstances, since, though the lapse of a few years may be sufficient to defeat the action in one case, a longer period

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may be held requisite in another, dependent upon the situation of the parties, the extent of this knowledge or means of information, great changes in values, the want of probable grounds for the imputation of intentional fraud, the destruction of specific testimony, the absence of any reasonable impediment or hindrance to the assertion of the alleged rights, and the like *Marsh v. Whitmore*, 21 Wall. 178; *Landsdale v. Smith*, 106 U. S. 391; *Norris v. Haggan*, 136 U. S. 556; *Hanner v. Moulton*, 138 U. S. 486."

Plaintiff urges that the intestate is not shown to have had knowledge of his rights, and, therefore, is not chargeable with neglect in failing to prosecute them. In the case of *Foster v. Mansfield Coldwater, etc. R. R. Co.*, 146 U. S. 88, 99, the court says:

"The defence of want of knowledge on the part of one charged with laches is one easily made, easy to prove by his own oath, and hard to disprove; and hence the tendency of courts in recent years has been to hold the plaintiff to a rigid compliance with the law which demands, not only that he should have been ignorant of the fraud, but that he should have used reasonable diligence to have informed himself of all the facts. Especially is this the case where the party complaining is a resident of the neighborhood in which the fraud is alleged to have taken place."

See also *Weininger v. Success Mining Co.*, 227 Fed., 548, 557, 558; *Naylor vs. Foreman Blades Lumber Co.*, 230 Fed. 658, 673.

There is no doubt that the elder Russell once knew that he was the owner of Fourth National Bank stock. He was a business man of experience. He resided in the neighborhood. The bank was obviously an active, going concern. He received substantial semi-annual dividends at regular intervals for two years, and then ceased to get them. The law at that time required the publication four times a year in a newspaper where the bank was established, of a report showing in detail the assets and liabilities of the company. (13 Stat. 109, 110). He must have known that the Bank held stockholders' meetings in January, as required by statute, and by attending them he could have been informed as to its condition and why he got no further dividends.

We have considered the question of Russell's actual know-

ledge of the facts, and it is referred to in dealing with the question of the statute of limitations.

For the purpose of the defense of laches, it is enough to say that unless he used reasonable diligence to have himself informed of the facts, mere ignorance will not excuse him. And *a fortiori* must this be true where his silence and failure to assert his rights continue for forty-five years until those persons who would naturally be able to explain and defend the conduct of the bank have passed away and after the records have been lost. Under ordinary circumstances a suit in equity will not be stayed for laches before and will be stayed after the time fixed by the analogous statute of limitation at law. When a suit is brought after such statutory time has elapsed, the burden is on the plaintiff to show that it would be inequitable to apply the doctrine of laches in this case. *Kelley v. Boettcher*, 85 Fed., 55; *Davey v. Dodge*, 213 Fed., 722, 727. Neither the pleadings nor the proofs show facts which justify so great a delay. See Pomeroy's *Eq. Jurisprudence*, 4th Ed. page 3445 note; *Shaw vs. Goebel Brewing Co.*, 202 Fed. 408, and note to same 45 L. R. A. n.s. 1090. The plaintiff's claim for equitable relief is barred by laches.

A decree may be drawn in accordance with the foregoing.

HAMILTON J. AND CUSHING J., concur.

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#### FORFEITURE CLAUSES MUST BE STRICTLY CONSTRUED.

Court of Appeals of Cuyahoga County.

DIETRICH v. EZRA SMITH CO.\*

Decided, March 9, 1920.

*Lease—Forfeiture Clause not Favored in Law—Will Not be Declared if Main Use of Premises Conforms to the Covenant.*

1. Forfeitures are not favored either in equity or at law. Conditions of forfeiture in a lease will therefore, be strictly construed.

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\*Motion to require the court of appeals to certify its record in this case overruled by the Supreme Court, June 17, 1920.

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2. Where a lease provides that the lessee shall use the premises only for certain purposes and for a forfeiture in case of violation of the covenants, the forfeiture will not be extended to a case where the main use of the premises conforms to the covenant in the lease and a portion of the premises are used as living quarters by the lessee, such being acquiesced in by the lessor's agents prior to and at the time the lease was executed.

*Joseph C. Bloch*, for plaintiff in error.

*Squire, Sanders & Dempsey*, for defendant in error.

**ALLREAD, J.**

Heard on error.

This is a proceeding to review a judgment of the municipal court in an action of forcible entry and detention.

The action in the municipal court was by the landlord against the tenant upon condition broken.

The defendant below sought reformation of the written lease upon the ground of mistake. Reformation was refused and an instructed verdict in favor of plaintiff below was returned.

We may assume that the reformation was properly refused, and consider the case upon the action at law.

It appears that Dietrich, the plaintiff in error, went into possession about March, 1918, under a verbal contract for a written lease. He remained in possession under the verbal agreement until March 12, 1919, when a written lease was executed for a term of three years.

The material provisions of the lease are as follows:

" \* \* \* being a storeroom, together with basement underneath located at No. 8017 Euclid Avenue. The premises are leased to the lessee upon condition and with the understanding that he will use the same only as a store for the sale of electrical goods and appliances and such other articles of merchandise as are usually kept in such stores. \* \* \* If any default be made in any of the conditions, covenants or agreements herein contained, or there be any refusal or neglect to perform the same on the part of the said lessee \* \* \* then and thenceforth it shall be lawful for said lessor or for the lessor's representatives to avoid this lease and re-enter upon said premises without any formal notice."

It appears that the premises leased consist of a business room with a frame partition near the middle and another partition in the rear part. The rear apartments were equipped with a hot water tank, toilet, and a sink. The undisputed testimony shows that the rear rooms had been used by previous tenants as living quarters, and that Dietrich from the time he took possession under the verbal lease used the same as living quarters. Bach, the agent of the plaintiff below, assured Dietrich that he might so use the same, and Heins, succeeding agent, had full knowledge of Dietrich's occupancy for living purposes.

The front room was occupied continuously by Dietrich as a store for the sale of electrical goods in accordance with the terms of the lease.

The forfeiture is based upon the occupancy of the rear part for living purposes.

It is well settled that forfeiture both in equity and at law are not favored. No better statement of this principle can be found than that by Judge Spear in *Webster v. Dwelling House Ins. Co.*, 53 Ohio St., 558:

"Relief against forfeitures is matter of equitable cognizance, but rules applicable to the subject are resorted to in courts of law, and there seems no good reason why the principles which govern courts of equity should not be available in a suit at law where the facts make such cognizance necessary to the ends of justice.

"A primal rule is that forfeitures are not favored either in equity or at law; indeed, it is declared as a universal rule that courts of equity will not lend their aid to enforce a forfeiture. Following as a corollary from this, provisions for forfeitures are to receive, when the intent is doubtful, a strict construction against those for whose benefit they are introduced."

See also *Toledo v. Rys. & Light Co.*, 2 C. C. (N. S.), 97, and *Eichenlaub v. Neil*, 6 Circ. Dec., 567; 10 C. C., 427.

The term "use" employed in the covenant in the lease ought not to be enforced in a technical or restricted sense, but may be reasonably enlarged to prevent a forfeiture. It is reasonable to hold that the word "use" include an incidental use.

The word "only" does not necessarily restrict or limit the

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meaning of the word "use." It applies whenever the use enlarged by including reasonable incidental uses is transcended and other independent and distinct uses are resorted to. Many businesses devote a part of their space to incidental work. Rest rooms and welfare departments for customers and employees are regarded as incidental, and such incidental uses would certainly not work a forfeiture of a lease unless it should be expressly and clearly so denominated in the lease.

It is a matter of common knowledge that small shopkeepers sometimes choose to live in connection with the business. This enables them to devote longer hours and give closer attention to business. It also gives them the benefit of the assistance of members of the family in cases of emergency.

The rear rooms involved in this lease were in a crude sense adapted to use as living quarters.

Dietrich testifies that it was agreed at the time of the oral lease that the rear rooms were to be so used, and that he did so use them during the term of said verbal lease, and was so using them at the time the written lease was executed. And he also testifies that he so notified Fisher & Allen, who acted for the owner when the leases were made. This testimony is undisputed. No objections were made to such use until November, 1919, about eight months after the execution of the lease. The evidence is sufficient to prove that both Dietrich and the company regarded the use of the rear rooms for living purposes as consistent with the lease. It is clear that Dietrich so understood it, and the agents of the owner, according to the undisputed evidence, must have known that Dietrich so understood it.

We quote from Porter, J., in *Hoffman & Place v. Aetna Fire Ins. Co.*, 32 N. Y., 405, 413, quoted with approval by Judge Spear in the *Webster case, supra*:

"It is a rule of law, as well as of ethics, that when the language of a promisor may be understood in more senses than one, it is to be interpreted in the sense in which he had reason to suppose it was *understood* by the promisee. \* \* \*

"It is also familiar rule of law, that if it be left in doubt, in view of the general tenor of the instrument and the relations

of the contracting parties, whether governing words were used in an enlarged or a restricted sense, other things being equal, that construction should be adopted which is most *beneficial* to the promisee."

The undisputed evidence in this case justifies us in the conclusion that it would be no injustice to the owner to construe this covenant as the parties evidently intended, and that it would be harsh and oppressive, to enforce a forfeiture against the tenant under the circumstances.

It is argued that an estoppel should not be applied against an enforcement of a continuing forfeiture by the failure of the party benefited to object in the initial stages.

We rely upon a liberal construction of the word "use" rather than estoppel, but if estoppel is to be employed we think the principle urged by counsel does not apply.

The estoppel in the present case sinks deeper. It is embedded in the consideration of the lease. It is presumed to have formed an inducement for the lease, and is represented in the rental agreed upon. The agents of the owner having recognized the incidental use at the time of the execution of the lease we think it would be inequitable and unjust now to restrict the use or enforce the forfeiture complained of.

It would, therefore, follow from the undisputed evidence that the court erred in instructing a verdict in favor of the plaintiff below.

The judgment will, therefore, be reversed and final judgment allowed in favor of the plaintiff in error.

FERNEDING and KUNKLE, JJ., concur.

**COMPETENCY OF EVIDENCE RELATING TO DEATH BY BEING STRUCK BY AN AUTOMOBILE.**

Court of Appeals for Franklin County.

**ERNEST PRINCE v. STATE OF OHIO.\***

Decided, November 6, 1919.

*Automobile Fatally Injures Boy Riding Bicycle—Evidence as to Speed—Violation of Speed Statute Proximate Cause of the Injury—Contributory Negligence of Decedent not a Defense.*

- 1 Evidence tending to prove that the accused was driving his automobile at a high rate of speed a short distance from the scene of the accident is competent.
2. Where it is established by the evidence that the accused operated his automobile in violation of the statute as charged and that such illegal act was the proximate cause of the injury and death of decedent—the fact that the decedent was guilty of negligence contributing to his death would not constitute a defense.

*C. M. Addison and E. J. Schanfarber*, for plaintiff in error.

*Hugo N. Schlesinger*, Prosecuting Attorney, *R. J. O'Donnell* and *G. Saffin*, Assistant Prosecuting Attorneys for Franklin county, for defendant in error.

KUNKLE, J.

Heard on error.

Plaintiff in error was indicted, tried and convicted of the crime of manslaughter. A motion for a new trial was overruled. Error is therefore prosecuted to this court.

Various errors are assigned in the petition in error and are urged by counsel for plaintiff in error in the brief which has been filed and also in the oral argument of counsel.

In brief the evidence shows that on July 3rd, 1918, at about eight-thirty o'clock a m., the plaintiff was driving a Ford auto-

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\*Motion to require the Court of Appeals to certify its record in this case overruled by the Supreme Court, March 16, 1920.

mobile and collided with one Ora J. Boyer, a boy of about twelve years of age who was riding upon a bicycle on Livingston Avenue in the city of Columbus. As a result of such collision Ora J. Boyer received injuries which caused his death within about one-half hour after the accident.

The State of Ohio relies upon the following sections of the Code for conviction of the plaintiff in error, namely:

Section 12603:

"Whoever operates a motor vehicle or motorcycle on the public roads or highways at a speed greater than is reasonable or proper, having regard for width, traffic, use and the general and usual rules of such road or highway, or so as to endanger the property, life or limb of any person, shall be fined not more than twenty-five dollars, and for a second offense shall be fined not less than twenty-five dollars nor more than fifty dollars."

Section 12604:

"Whoever operates a motorcycle or motor vehicle at a greater speed than eight miles an hour in the business and closely built-up portions of a municipality, or more than fifteen miles an hour in other portions thereof or more than twenty miles an hour outside of a municipality, shall be fined not more than twenty-five dollars, and, for a second offense shall be fined not less than twenty-five dollars nor more than fifty dollars."

During the progress of the trial there was no testimony introduced which tended to show that the accident occurred in the business and closely built-up portions of the city of Columbus and the trial court instructed the jury that the provisions of the above quoted section to the effect that the speed of the automobile should be limited to eight miles per hour in such sections of the city did not apply and that the limit as to the speed, fixed by the statute, insofar as this case is concerned, was fifteen miles per hour.

Counsel for plaintiff in error claim the court erred in the admission of evidence tending to show the rate of speed at which the automobile was traveling a short distance before reaching the scene of the accident.

There was evidence tending to show certain marks upon the

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street which marks were claimed to have been made by the skidding of the automobile just prior to the collision.

Considering all the evidence upon this subject we think the trial court did not err in admitting the same. This is true especially in view of the instructions given by the trial court in the general charge.

Counsel for plaintiff in error also claim the court erred in its general charge to the jury and also in its refusal to give certain special instructions in advance of the argument.

This is an important question and we have given the same careful consideration.

The portions of the charge especially complained of are as follows:

"If the death of the boy was due solely to his own acts, the defendant would not be guilty even though you might conclude that the defendant was at the time violating the statute. But the defendant will not be excused because the boy might have been at the time of the collision guilty of negligence which contributed to his own injury and death, if you also find that the defendant was at the time violating the statute, and that the defendant's unlawful act in violating the statute also contributed to causing the collision and death of the deceased. That is if the jury should find that the boy by his own conduct endangered his own safety and contributed to his own injury and death, still if you find that at the time of the collision which resulted in the death of the deceased, the defendant was in the commission of an unlawful act, to-wit the violation of the statute, and that this violation of the statute on his part contributed to the injury and death of the deceased, then you should find that the defendant is guilty although you may find that the defendant's unlawful act was not the sole cause of the death of the deceased."

Counsel for plaintiff in error cite the following from Section 902 of Berry on Automobiles, namely:

"To warrant a conviction of manslaughter, on account of the killing of a human being by the negligent operation of an automobile the conduct of the accused must have been the proximate cause of death. While the contributory negligence of the deceased is no defense, still the conduct of the deceased must be

considered in determining the proximate, or actual cause of the death."

It is claimed by counsel for plaintiff in error that the court should have gone further in its general charge and instructed the jury that they might consider the alleged contributory negligence of the decedent for the purpose of determining whether the plaintiff in error was operating his automobile at the time in question at an unreasonable speed under all the circumstances then existing.

We concede that this question is not entirely free from doubt but are of the opinion that the above quotation from Berry on Automobiles states the law correctly.

We think the charge of the trial court on the subject of proximate and contributing causes was correct insofar as it went.

As stated by the trial court the contributory negligence of the decedent is not a defense unless it is the sole proximate cause of the accident.

It will also be noted that the trial court before argument of counsel to the jury, at the request of plaintiff in error, charged the jury upon the subject of proximate cause as follows:

"And it is not sufficient that the evidence of such acts may have been proven to you by some evidence or by the preponderance of the evidence, but you must be convinced beyond a reasonable doubt that at the time the injury occurred the defendant was driving the machine at the speed or in the manner hereinbefore stated to you, and that such driving was the approximate cause of the death of Ora Boyer."

We think the trial court might properly have added an instruction to the effect that the acts of the decedent just prior to the collision might be considered upon the question as to whether under all the circumstances the speed of the automobile was unreasonable but in order to make the failure to give such charge prejudicial error we think it was incumbent upon plaintiff in error to have presented to the court a proper charge upon that subject. 67 O. S., 53; 5 C. C. Reports, N. S., 437.

The testimony offered by the state tends to prove that the plaintiff approached the scene of the collision at a rate of speed

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of from thirty to forty miles per hour and that marks were found on the street at a point near the place of the accident which indicated the skidding of the automobile due to a sudden application of the brakes.

These marks were discovered at a distance of  $96\frac{1}{2}$  feet from the point where the automobile struck the curb and was stopped.

It is true the testimony as to the speed of the automobile was denied by plaintiff in error but we think the jury might well have accepted the evidence of the state as to the fact that plaintiff in error was driving the automobile in question at an unlawful rate of speed at the time of and just prior to the collision.

We are also of the opinion that the jury was justified under the evidence in finding that the unlawful rate of speed immediately before the collision was a proximate and contributing cause of the collision.

In the case of *State v. Schaeffer*, 96 O. S., 216, the first portion of the seventh paragraph of the syllabus is as follows:

"The unlawful act relied upon as the predicate for manslaughter must be the proximate cause of death. If death resulted from any other cause, or there be a reasonable doubt as to the unlawful act being the proximate cause of death, the jury should acquit."

In the decision in the above case Judge Wanamaker on page 242 discusses the question of proximate cause and also what will constitute prejudicial error in cases of this nature.

In the case at bar there is no dispute but that the automobile killed Ora J. Boyer. We can not escape the conclusion that the jury was justified under the evidence in finding that the unlawful rate of speed at which this automobile evidently was being driven was the proximate cause of this boy's death.

It is also claimed by counsel for plaintiff in error that counsel for defendant in error were guilty of such misconduct in their argument to the jury as would justify this court in granting a new trial. Our Supreme Court in the case of *Dock v. Trapnell*, 88 O. S., page 516, has stated the rule which governs reviewing courts upon the question of misconduct of counsel. The court say:

"Remarks of this kind are wholly improper in the trial of the case and it is the duty of the trial court to see that they are not made, or at least not persisted in, but something must be left to the discretion of a trial court, otherwise we would never reach an end to litigation, and a reviewing court ought not to reverse unless it clearly appears that such misconduct was of such character and so persistent as to prevent a fair trial of the cause," etc.

We have carefully examined the record as to this ground of error and applying the above rule to the record in this case find nothing in the record which would warrant this court in disturbing the verdict upon the ground of misconduct of counsel for defendant in error.

We have considered all the grounds of error suggested by counsel for plaintiff in error in oral argument and in their brief but finding no error in the record which we consider prejudicial to plaintiff in error the judgment of the lower court will be affirmed. If desired a stay of execution for thirty days will be allowed to enable plaintiff in error to prosecute the case in Supreme Court.

ALLREAD and FERNEDING, JJ., concur.

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**LIABILITY FOR INJURY TO PROPERTY IN THE HANDS  
OF A BAILEE.**

Court of Appeals for Huron County.

GFELL v. THE JEFFERSON HARDWARE CO.

Decided October 17, 1917.

*Negligence—Injury to an Automobile in the Hands of a Bailee—Contributory Negligence of the Bailee Not a Bar to Recovery by the Bailor.*

The owner of property in the hands of a bailee may recover from a third person damages caused to such property by the negligence

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\* Motion to require the Court of Appeals to certify the record in this case overruled by the Supreme Court, February 5, 1918.

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of the third person, even though the bailee be guilty of contributory negligence in the handling of the property, and even if the bailee, in an action brought by him, might be met by the defense of contributory negligence.

*Young & Young*, for plaintiff in error.

*Wickham & Martin*, for defendant in error.

CHITTENDEN, J.

Heard on error.

This action was brought by the plaintiff, George Gfell, to recover a judgment for damages sustained by reason of injuries to an automobile belonging to him, resulting from a collision with a delivery wagon owned by the defendant. The trial resulted in a verdict in favor of the defendant. Judgment being entered thereon, a motion for new trial having been overruled, error is prosecuted in this court.

The error relied upon for reversal is in the charge of the court to the jury.

At the time of the collision the automobile was being driven by one Frank J. Herman, and was proceeding in a southerly direction on Benedict avenue in the city of Norwalk. Near the Children's Home the automobile overtook the delivery wagon, drawn by one horse, and driven by one James A. Vradenburg, an employee of the defendant. Both vehicles were traveling in the same direction. The driver of the automobile undertook to pass the delivery wagon on the right hand side thereof. At about this time the driver of the delivery wagon turned to the right for the purpose of entering the drive to the Children's Home, where delivery of material was to be made, and thereupon the driver of the automobile applied the brakes hard causing the automobile to skid. The damage arose, as claimed by the plaintiff, by reason of the automobile being struck on one side by the delivery wagon and by being forced into the curbing and a telegraph or telephone pole at the side of the street.

The evidence is in conflict as to the exact position of the delivery wagon just prior to the collision. Plaintiff claims that

the delivery wagon was upon the left-hand side of the street contrary to the provisions of the state law and the city ordinance. The defendant claims that the delivery wagon was not on the left-hand side of the road, but that it had turned over to about the middle of the road for the purpose of enabling the driver to turn into the driveway of the Children's Home. Defendant claims that there was plenty of room for the automobile to pass on the left-hand side of the delivery wagon, as required by the state law and the city ordinance, and that the driver of plaintiff's machine was negligent in attempting to pass on the right-hand side.

Before argument counsel for plaintiff requested the court, in several written instructions, all framed to present the same question, to charge the jury that no question of contributory negligence was involved in the case. These propositions were based upon the theory that the evidence did not show that Herman, who was driving the automobile, was an agent or servant of the plaintiff, and that it did show that the driver was in possession of the automobile as a gratuitous bailee. These instructions were all refused by the trial court, who, in the general charge, instructed the jury, in substance, that they were to determine from all the evidence whether or not the relation of agent or servant existed between the plaintiff and Herman, and that if they found that such relation existed and that Herman was guilty of negligence directly contributing to the injury to the automobile the plaintiff could not recover.

An examination of the record discloses no evidence from which the jury would be justified in finding the relation of principal and agent or master and servant between the plaintiff and Herman. The only evidence upon the subject shows that the relation of bailor and bailee existed, and that Herman was in possession of the automobile as a gratuitous bailee. We find that the great weight of authority is to the effect that when such relation exists the bailor may recover of a third person for damages caused to the property of the bailor in the hands of the bailee, if caused by the negligence of a third person, even though the bailee be guilty of contributory negligence in the

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handling of the property, and even if the bailee, in an action for damages brought by him, might be met by the defense of contributory negligence. We will not undertake to cite the numerous cases in which the subject has been discussed, but call attention to the decisions in the two cases, *Spelman v. Delano*, 177 Mo. App., 28, 163 S. W. Rep., 300, and *Loomis v. Norman Printers' Supply Co.*, 81 Conn., 343, 71 Atl. Rep., 358.

In the course of the opinion in the case first above cited is found the following quotation from Van Zile on Bailments, Section 130:

"The bailee does not stand in the place of the bailor; he does not represent him in such a relation as would render the bailor liable for his negligent acts, or for the negligent acts of his servants or agents; and so, while in an action brought by the bailee against third parties for the injuries to the property, the third party may defend in the action upon the ground of contributory negligence upon the part of the bailee, his servants or agents, in an action by the bailor, who is the owner of the property, against a third party for injury to the bailment, the negligence of the bailee, or his servants or agents, would be no defense and would not prevent a recovery for the reason that such negligence is not imputable to the bailor."

The doctrine of imputed negligence does not prevail in Ohio. (*Davis v. Guarnieri*, 45 Ohio St., 470, and *Norwood v. Hauk*, 19 C. C. 656; 10 C. D., 826.) This court has repeatedly followed the doctrine as announced in the two cases just cited.

It follows from what has been said that the instructions requested by the plaintiff to be given before argument, in so far as they sought to exclude the question of contributory negligence, should have been given, and their refusal constituted prejudicial error. It is entirely settled by the decisions of the Supreme Court and this court that it is error to charge upon the subject of contributory negligence in a case in which that issue is not properly presented by the pleadings or the evidence.

In view of the fact that the judgment must be reversed and the cause remanded, we think it proper to express our views as to the effect of the ordinance introduced in evidence. Section

218 of the general ordinances of the city of Norwalk provides that "every vehicle shall keep on the right side of the street, except when necessary to turn to the left in crossing or in overtaking another vehicle." It is an elementary proposition that ordinances of this character must be reasonable in order to be valid. It is quite evident that the regulation is a proper one and tends to facilitate traffic upon the streets and the safe use thereof. In order to be valid, however, it must be so construed as to permit the reasonable use of the street in gaining access to and egress from property abutting thereon. The court charged the jury, in substance, that if the driver of the delivery wagon turned to the left only so far as was reasonably necessary in order to make the turn to gain access to the grounds of the Children's Home, which abutted on the west side of the street, he was not guilty of negligence *per se* in so doing by reason of the fact alone that in making the turn he went to the left of the center line of the street. We think that this instruction is correct. It is manifest that a reasonable interpretation of this ordinance includes not only the right to turn across the street at street intersections, but also to turn into alleys and private driveways.

We do not find from the evidence in this case that the doctrine of joint enterprise is applicable.

For the reasons above stated, the judgment of the common pleas court will be reversed and the cause remanded for new trial.

KINKADE and RICHARDS, JJ., concur.

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**WOMAN STRUCK BY AUTOMOBILE WHEN NOT ON DESIGNATED CROSSING OF STREET.**

Court of Appeals for Hamilton County.

LUEBBERING, ADMR., v. WHITAKER.\*

Decided, April 7, 1919.

*Negligence—In Failure by Pedestrian to Use Designated Street Crossing—Not Available to Defendant Automobile Owner Who Has Failed to Plead or Prove Ordinance—Photograph of Automobile Causing the Injury Admissible, When—Notice to Adverse Party of the Taking of Depositions.*

1. In an action to recover damages for wrongful death resulting from the operation of an automobile in violation of a municipal ordinance, it is error to charge the jury that a verdict should be returned for defendant if the evidence showed that plaintiff violated a section of the ordinance requiring pedestrians to cross streets or highways at right angles and at regularly designated crossings, where such section of the ordinance was not pleaded or offered in evidence.
2. A photograph correctly representing the condition of an automobile after an accident is admissible in evidence.
3. The duty imposed upon a defendant under the doctrine of last chance arises only after the discovery of plaintiff's peril; but the doctrine does not apply where the negligent acts of the plaintiff are concurrent with the negligent acts of the defendant.
4. A notice to the adverse party that depositions of witnesses would be taken "at Camp Hancock, Georgia, in the County of Richmond, in the State of Georgia," is not a sufficient compliance with the provisions of Section 11534, General Code, which requires that the notice shall state "the place where" depositions are to be taken.

*W. H. Rucker and Thomas Usher, for plaintiff in error.*

*DeCamp & Sutphin and Leo J. Brumleve, Jr., for defendant in error.*

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CUSHING, J.

Heard on error.

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\*Judgment affirmed by the Supreme Court, June 8, 1920.

The second amended petition, on which this case was tried, is indefinite and uncertain. Its allegations do not comply with the provision of Section 11305, General Code, requiring "a statement of facts constituting a cause of action in ordinary and concise language."

It was charged that plaintiff's decedent, Mrs. Elizabeth Doecker, was crossing Linn street, some distance south of Court street; that defendant, Abner L. Whitaker, was negligent in driving his automobile past a street car that had stopped on the north side of Court street to receive and discharge passengers; that in so doing he violated ordinances of the city of Cincinnati; that he failed to have his automobile under control, to sound a warning, to keep a proper lookout for pedestrians; and that at the point in question he drove said automobile at an unlawful rate of speed.

From the record it is undisputed that at the time Whitaker proceeded from the north side of Court street no street car was stopped as claimed; that there was nothing to obstruct either Mrs. Doecker's or Mr. Whitaker's view of each other, and that the accident happened south of the south line of Court street.

The question is, Did the accident happen on account of the automobile running into Mrs. Doecker, or by her walking into the side of it?

There are many loose, irrelevant statements in the pleadings, evidence and briefs, so that a number of the assignments of error need not be considered.

The motion to reform the petition by striking out, and making other parts definite and certain, was well taken, and was properly granted.

It is claimed there was error in admitting in evidence the following sections of ordinances:

Section 680-11 (4). "Pedestrians shall not cross streets or highways except at the regularly designated crossings, and then at right angles only."

Section 680-12. (1). "No owner or operator of any vehicle shall drive, operate or move or permit the same to be driven,

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operated or moved on any street, alley or park driveway of the city of Cincinnati at a rate of speed in excess of eight (8) miles per hour within the territory bounded on the north by the center line of Eighth Street, on the east by the east line of Sycamore Street, on the south by the center line of Fourth Street, and on the west by the west line of Elm Street; said territory being defined as the business and closely built up portion of the city; nor in excess of fifteen (15) miles per hour on any street, alley or park driveway in the city outside of said territory."

Counsel cite *McIlhenney v. Philadelphia*, 214 Pa. St., 44, and *Baker v. Close et al.*, 204 N. Y., 92. Neither of these cases is in point. It was not pointed out in either that any statute or ordinance was considered by the court.

It is settled in Ohio that the regulation of traffic on highways is within the scope of the powers of the legislative branch of the state government. In the absence of any claim or authority that such legislation is unconstitutional or void, it will be held valid. In the case of *Schell v. DuBois, Admr.*, 94 Ohio St., 93, the Supreme Court of Ohio settled the question of legislative authority and also the effect of a violation of such enactment.

Section 680-11 (4), above quoted, was offered in evidence, and special charge No. 6, requested by defendant, was given. That part of the ordinance requiring the director of public service to designate street crossings and extensions of sidewalks was not pleaded or offered in evidence; nor was there any evidence as to where the crossing, designated or otherwise, was at or near the point in question. On this state of the record the giving of special charge No. 6 was error. That charge is as follows:

"The court charges that if you find that the plaintiff's decedent attempted to cross Linn Street at any point other than a regularly designated crossing, or if you find that in attempting to cross Linn Street, she did not cross at right angles with Linn Street, in violation of Section 680-11, part 4, of the ordinance of the city of Cincinnati, she was guilty of negli-

gence, and if you further find that such negligence was the proximate cause of the accident, or that it combined with the negligence of the defendant, if you should find that the defendant was negligent, to produce the proximate cause of the accident, then your verdict must be for the defendant."

It is also contended that the admission of Exhibits B and C, photographs offered in evidence, constituted error prejudicial to plaintiff. Benj. L. Hawkins testified that he had washed the automobile a short time before the accident, that he knew the condition of the same, and that the marks in question were not on it prior to the accident; that he examined it shortly after the accident, and the marks were then just as shown in the photograph. The rule of evidence is that if the photograph at the time correctly represents the condition of the article, which can not be presented in court, it is admissible in evidence. *The C., H. & D. Ry. Co. v. De Onzo*, 87 Ohio St., 109.

Plaintiff in error complains of the refusal of the court to give special charge No. 2, which is as follows:

"If you believe by a preponderance of the evidence that the decedent, Elizabeth Doecker, as a result of her own negligence, put herself in a place of danger in the street, nevertheless if the defendant by exercising that degree of care which an ordinarily careful and prudent person would have exercised under the same or similar circumstances, could have discovered the plaintiff's danger and by the use of ordinary care avoided injuring her, and failed to use that degree of care and she was thereby injured, the defendant is liable."

The record shows that the conduct of the plaintiff, if it constituted negligence, was concurrent with the acts of negligence claimed by plaintiff to have been committed by the defendant. Under such a state of facts the doctrine of last chance has no application. Besides it was not pleaded. See *Taylor v. Ohio Electric Ry. Co.*, 29 O. C. A., 401 (Motion to certify denied February 11, 1199, 16 O. L. R., 507); *Drown v. Northern Ohio Traction Co.*, 76 Ohio St., 234; *Bejac v. The C., P. & T. Ry. Co.*, 23 C. C. (N.S.), 475, affirmed, 90 Ohio St., 409; *Galati v. The Erie Railroad*, 23 C. C. (N.S.), 63; *Henry v. The C., L. & A. Elec-*

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*St. Rd. Co.*, 23 C. C. (N.S.), 40; *Harris v. The Mansfield Railway, Light & Power Co.*, 21 C. C. (N.S.), 209, 4 Ohio App., 108, and *Goodman v. The Cleveland Electric Ry. Co.*, 16 C. C. (N. S.) 208.

Moreover, we are of opinion that the charge presented does not correctly state the law. It imposes on the defendant a liability for injuring a plaintiff who has been guilty of negligence, because of defendant's failure to use care thereafter to avoid the accident, in the absence of actual knowledge of the danger in the case of *West, Recr., v. Gillette, Admr.*, 95 Ohio St., 305. of plaintiff. The precise point was not decided by the court. The majority opinion on that point is not inconsistent with the opinion of Jones, J., who dissented, as the majority deemed it unnecessary to pass upon this question since the record showed that the defendant had actual knowledge. The dictum on page 316 states that the rule set forth in Thompson on Negligence "is well founded in reason and authority." Cf. page 329. we can add nothing to what was said by Jones, J., in that case. The duty imposed upon a defendant under the doctrine of "last clear chance" becomes existent after the discovery of plaintiff's peril. The court properly refused to give special charge.

The trial court overruled a motion to strike the deposition of Charles R. Heeter from the files, and permitted it to be read in evidence over the objection of plaintiff. Notice of the taking of depositions was served on plaintiff's counsel advising that defendant would take the depositions of sundry witnesses "at Camp Hancock, Georgia, in the County of Richmond, in the State of Georgia." Section 11534, General Code, requires written notice of the intention to take deposition. Among other things, it must state "the time when and the place where it will be taken." What did the legislature mean by the words "the place where"? Evidently it was a definite location of such description that opposing counsel could locate it, and, if he desired, be present to cross-examination the witness.

In *Lucas v. Richardson*, 68 Cal., 618, it was held that a notice to take depositions before D. G. Craig, a notary public in San Francisco, Cal., was not sufficient as to place.

In *Harris v. Hill & Relf*, 7 Ark. (2 Eng.), 452, it was held:

"A notice to take them (depositions) 'at the court-house in the city of New Orleans, in the State of Louisiana,' is not sufficiently definite as to the place—there being several courts held under the same roof, but in different apartments, above and below stairs.

"A party is entitled to such a description of the place as to distinguish it from all others."

The same was held in *Knode v. Williamson*, 17 Wall., 587, 589, where the city of Guilford, state of Maine, was designated as the place. The court say:

"A party who attempts to use the deposition of an absent witness must show that he has given his adversary an opportunity to cross-examine by a notice that is definite and certain, unless the failure to give such notice has been waived. Such was not the notice given in this case, and the deposition was, therefore, erroneously received in evidence."

*Crozier v. Gano*, 4 Ky., 257; *Rodman v. Kelley*, 13 Ind., 377, and Kinkead's Ohio Civil Trial and Procedure, Section 447, page 366, are cited to the same effect.

The notice was insufficient as to the place and the deposition should not have been received in evidence. It contained important testimony on the most substantial points in the case. Its admission was prejudicial error.

The evidence is clear that the accident happened at a point south of the intersection of Court and Linn streets; that it happened by the deceased walking into the side of the automobile; that aside from the errors stated the questions of fact were submitted to the jury under proper instructions.

The judgment will be reversed and the cause remanded for a new trial.

SHONL, P. J., and HAMILTON, J., concur.

**SPECIFIC PERFORMANCE REFUSED BUT DAMAGES  
RECOVERABLE.**

Court of Appeals for Lucas County.

CAPLE v. CRANE ET AL.

Decided, December 24, 1917.

*Breach of Contract to Sell Real Estate—Caused by Wives of the Owners Refusing to Sign—Action for Specific Performance Does not Lie—But Damages May be Recovered for Failure to Perform.*

1. Where the plaintiff enters into a written contract for the purchase of real estate with the owners thereof and knows that such owners are married, but the wives of such owners do not sign the contract although it was contemplated by the parties that the title should be conveyed free from the dower rights of the wives, and where the wives without fraud or collusion with their husbands refuse to execute deeds conveying such real estate, a decree of specific performance will not be granted against the owners, with a provision for an abatement from the purchase price of the value of the inchoate right of dower of the wives, but the plaintiff will be remitted to his claim for damages for breach of the contract.
2. Where an action is brought in good faith for specific performance and the court refuses to grant that relief, damages may be awarded to the plaintiff in the same action for a failure on the part of the defendant to perform the terms of the contract.

*Tracy, Chapman & Welles and L. W. Morris, for plaintiff.  
Geer & Lane, for defendants.*

CHITTENDEN, J.

Heard on appeal.

This is an action brought by the plaintiff for the specific performance of a contract for the sale of real estate, and to reform such contract if the court finds that it does not, as written, obligate the owners of the property to convey the entire title, including the dower interests of the wives of the two owners, as claimed by the plaintiff. The prayer of the petition also asks, if it is found to be impossible for the de-

fendants or either of them to comply with the terms of said contract by delivering full title to said property, including the dower interests of their respective wives, that the court will ascertain the extent of plaintiff's damage by reason of such breach of contract by the defendants, or either of the and in lieu of specific performance of said contract award plaintiff judgment against the defendants for his damages. There is also a prayer for all other and further relief to which the plaintiff may be entitled.

The contract sought to be enforced, as originally drawn, reads as follows:

"We and each of us hereby give to Alva B. Caple the sole and exclusive right to purchase the land known as 104.52 acres more or less, reserving entrance to 20 acres on west of said tract to be not more than 100 feet wide along west side of 104 acres, all in Perrysburg Township, Wood Co., Ohio, lying west of land of Alva B. Caple and south of Whitmore tract & Crane 40 acres with barns.

"Land shall be surveyed by Joe Hofman and price shall be \$175.00 per acre cash, according to survey.

"Purchaser shall pay June, 1917, taxes and assessments and subsequent payments. Each party shall pay F. G. Crane as agent one per cent. of purchase price.

"Sellers reserve right to cut off all timber if removed within 30 days.

"Deal to be closed and deed and abstract offered within 30 days if option accepted. Option offered for three days, unless accepted by February 3rd shall be void. Abstract shall not be continued nor sellers pay anything extra on costs of suit to quiet title."

The option as finally signed by all the parties had been altered by erasing the words "for three days" in the last paragraph and changing the date "February 3rd" to February 28th. At the bottom of the option as finally executed was written: "February 23rd 1917, above accepted, Alva B. Caple."

Two principal defenses are interposed by the defendants:

First. That there was no authorized delivery of the contract to the plaintiff and that the option offer was not accepted within the time limit set forth in the option.

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Second. That the option not having been signed by the wives of the defendants, and they refusing to join in the execution of a deed for the property, the contract is not subject to enforcement by decree of specific performance against the husbands, providing for an abatement from the purchase price of the value of the dower interests of the wives.

The evidence shows that shortly before January 31, 1917, Frank G. Crane, an attorney of the city of Toledo, was acting as the attorney and agent of the defendants. He inquired of Caple whether he would consider the purchase of the property, whereupon Caple advised him that if he would have a written option prepared and signed by the defendants that he would advise him at once whether or not he would accept their offer, but he declined to make any offer for the property himself. On January 31, after discussing the matter with Isaac Crane, Irving J. Crane called at the office of Frank Crane, and after a consultation Frank Crane wrote the option in question. Thereupon Irving took the option to the home of his brother Isaac, where it was read to Isaac by his wife. Irving then took the option with him to his home, and he testifies that he signed it at four-thirty A. M. on February 2, after which he laid it upon the clock shelf, where it remained for some days, until Isaac called at the house of Irving. As Isaac was leaving, Irving took the paper from the shelf and handed it to Isaac, saying, "Here is that option." It is claimed that nothing further was said with reference to it at that time. Isaac took the option home where it remained on his mantel for some days. He finally took it to the office of Frank Crane, and there the words were erased and the date changed, as above indicated. After this was done Isaac signed the option, and it was on the following day presented to Caple by Frank Crane. Caple asked to have some modifications made in the option, which Frank endeavored to have made, but without success. Thereupon, on the next day, Caple signed his acceptance of the option. Shortly thereafter Irving Crane declined to go forward with the option, and thereupon his brother Isaac also declined to carry out the agreement.

Irving Crane claims that the option was not delivered by any authority from him; that the time limit had expired before the

delivery to Caple; and that it was, therefore, not a valid option and the acceptance by Caple did not effect a contract.

In view of the evidence adduced, we are unable to accede to this contention. Irving Crane's testimony is not at all convincing upon this phase of the case. It is inconceivable that he should have handed the contract to his brother without any further comment than done with it to carry out the offer therein contained. It is evident that Isaac obtained no such impression from the occurrence, because he later took the option to Frank Crane, and, after having the date of the limitation changed, signed the option himself, and left it, as he says, to be submitted to Caple, with the understanding and belief that both himself and his brother were then making an offer to Caple for the sale of this property.

Mr. Frank Crane testifies that he talked with Irving Crane over the telephone, and that at that time Irving said, "It is all wrong, but I suppose we will have to go through with it."

The conclusion is irresistible from an examination of the evidence that the determination on the part of Irving to repudiate the offer was formed after its acceptance by Caple, and when perhaps his wife had made a positive refusal to join in a deed of conveyance. We find without hesitancy from the evidence that the option was signed by both the defendants and delivered to Frank Crane for the purpose of extending the written offer therein contained to Alva Caple.

The evidence shows conclusively that this option, which was hurriedly prepared, was intended by both defendants, and so understood by plaintiff, to provide for the sale and conveyance of the property and the giving of a good and complete title to the plaintiff, free from the dower interests of the defendants' wives, and we hold that the option as accepted constitutes a valid contract between the parties, calling for the conveyance to the plaintiff of the property with that character of title.

With respect to the prayer of the plaintiff's petition, that the court by its decree should reform the contract, we think it is only necessary to say that our construction of the contract gives it all the scope it would have if it were reformed along the lines suggested by the plaintiff. (*Moore vs. Moulton*, 2 Weekly Law Bulle-

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tin 323, 325, 6 Am. L. Rec., 466, 5 Dec. Rep., 534.) We entirely approve the language of Judge Tilden found in his discussion under his subdivision five.

The defendants were both married and living with their wives at the time of the execution of this contract, and this fact was well known to the plaintiff, whose wife is a sister of the defendants. The option was not signed by the defendants' wives and there is no evidence tending to show that they ever agreed to sign the option or to join in a deed conveying the property. There is some evidence indicating that the wife of Isaac would have been willing to join in a deed if the transaction had gone through without difficulty. The wife of Irving says that she positively refused to join in a deed when the option was shown to her on the evening of January 31, and that she has ever since maintained that attitude. At the time of the trial Isaac's wife also said she would not join in a deed for this property.

This presents an important and somewhat difficult question, namely: Shall a decree of specific performance be entered against the defendants requiring them to execute a deed in which their wives shall join; or, if the wives refuse to join, a decree of specific performance against the husbands, with an abatement from the purchase price sufficient to cover the present worth of the contingent right of the dower of the wives?

In the consideration of this question we have examined many authorities and find those authorities not in accord upon this subject. The defendants rely largely upon the case of *People's Savings Bank Co. v. Parisette et al.*, 68 Ohio St., 450, claiming that the present case comes within the second proposition of the syllabus in that case. Counsel for plaintiff seek to distinguish the facts in that case from those in the case under review, and assert that by reason of the difference in the facts the case is not an authority and is not controlling in this case. After a very careful consideration of the case of *Saving's Bank Co. v. Parisette* we are unable to find a sufficient difference in the principal facts to justify us in declining to follow that case as an authority. The plaintiff knew that he was dealing with the husbands alone. He knew that they were married and that

their wives could not be compelled to sign a deed, and that, therefore, the contract was impossible of execution if construed to include their dower interests. Such were also the controlling facts in the *Parisette case*. The court in the opinion in that case calls attention to the fact that the effect of making an abatement would result in an attempt to arrive at a sum to be deducted by a process admittedly speculative, or with an alternative of suspending a considerable portion of the purchase money to the seller during the joint lives of himself and his wife. The Supreme Court recognizes in its decision that a different rule prevails in a number of states, but we think it deliberately announced a rule in this state which precludes the specific performance of a contract for the sale of real estate executed by a husband whose wife does not join in signing the contract of sale and refuses to join in the execution of a deed. This rule is subject to the qualification that such refusal upon the part of the wife shall not be the result of fraud or collusion upon the part of the husband and the wife.

The Supreme Court, in the case above, cites many authorities in support of its conclusion. Among others are *Riesz's Appeal*, 73 Pa. St., 485. The same rule is also announced by the supreme court of Pennsylvania in *Burk's Appeal*, 75 Pa. St., 141, and in *Burk v. Serrill*, 80 Pa. St., 413. We also add the case of *Graybill v. Brugh*, 89 Va., 895.

We therefore conclude that the case of *Savings Bank Co. v. Parisette* is a controlling authority in this case.

The evidence fails to show any fraud or collusion between the husbands and wives bringing about the refusal of the wives to join in the execution of a conveyance. The evidence also fails to show such knowledge and concurrence in the option on the part of the wives as to bind them in any way in the execution of the option. In any event the wives are not made parties to this action and therefore any decree made in this case would not be binding upon them.

The failure of this court to give relief to the plaintiff by a decree of specific performance does not mean that the plaintiff is without a remedy in this court in this case. The evidence

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shows a breach of a valid contract to convey to the plaintiff the full title to the property described in the option, and the plaintiff is entitled to recover any and all damage that he may have sustained as a direct result thereof. The authorities are numerous to the effect that where an action is brought in good faith for specific performance, and the court declines to grant that relief, damages may be awarded to the plaintiff for a failure upon the part of the defendant to carry out the terms of the contract. We call attention to *Sternberger et al. v. McGovern*, 56 N. Y., 12. In the code states where the distinction between actions at law and in equity is abolished it is unnecessary to dismiss the action and remit the party to a court of law to obtain damages. In this state there is but one form of action, namely, a civil action, and the same court administers the relief to which the pleadings and facts show the party to be entitled. The petition in this case is broad enough to justify the court, if the evidence so warrants, in awarding damages.

No evidence has been introduced in this case upon the subject of damage sustained by the plaintiff, it being agreed that if it became necessary to take testimony upon the subject it would be done later. It has been the practice of this court to remand causes to the court of common pleas for the purpose of ascertaining damages when that relief became necessary, and that will be the practice followed in this case.

A decree may therefore be drawn refusing specific performance of the contract and remanding the case to the common pleas court for the purpose of ascertaining the damages to which the plaintiff may prove himself entitled.

Judgment accordingly.

RICHARDS, J., concurs.

**KINKADE, J.**

I concur in the conclusion reached, that the option as drawn, delivered and accepted constituted a contract between the owners and the purchaser for the conveyance of the full title to the

land described in the option, including the inchoate right of dower of the wives of the two owners. The evidence offered in the case clearly established the fact that this was the intention of both the owners who signed the contract and of the purchaser who accepted it. This makes the case one, in my opinion, very different from the case of *Savings Bank Co. v. Parisette*, 68 Ohio St., in which this language concerning the contract is used with respect to the purchaser and the owners, on pages 460 and 461:

"The company [the purchaser] knew, therefore, that it was dealing with the husband alone as to his right and title in the property; it knew that the wife could not be compelled to sign, and that, therefore, the contract was impossible of specific performance if construed to include her dower. It knew that it was accepting a contract which on its face did not purport to sell any interest but that of the husband, and especially did not purport to sell or agree to convey any inchoate dower of the wife."

It will be seen from this language that the supreme court in the *Parisette* case found that the contract did not purport to convey the property free from claim of dower. In this case we hold this contract did obligate the owners to convey the property free from inchoate rights of dower held by their wives. I can not view the case of *Savings Bank Co. v. Parisette* as an authority against the right of the plaintiff in this court to have a decree of specific performance in his favor, and am of opinion that should have been the decree here, with an abatement to cover the present value of the inchoate dower interests.

A majority of the court having reached the conclusion that specific performance is not the proper remedy here, I concur fully in the action of the court in remanding the case to the court of common pleas for the one purpose alone of assessing the damages that the plaintiff is there found entitled to recover.

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**LIABILITY FOR THE DEATH OF A SEAMAN BY BEING  
WASHED OVERBOARD.**

Court of Appeals for Cuyahoga County.

Metcalfe, Pollock and Farr of the Seventh judicial district setting by designation in the Eighth District.

CLEVELAND TRANSPORTATION CO. v. ANDERSON, ADMX. \*

Decided, February 9, 1920.

*Negligence—In Failing to Make Ship Seaworthy—Unexplained Breaking of a Rail, Designed for Protection of Seamen, Sufficient Evidence of—Proximate Cause of Seaman Being Washed Overboard.*

1. The owner of a vessel engaged in carrying trade on the great lakes owes a duty to a seaman engaged on such vessel to make the ship seaworthy so that the ship and all its parts will render the service for which it was designated.
2. The unexplained breaking of a part of the ship,—*i. e.*, the rail running on the top of the bulwarks and designed as a protection to seamen—unless under extraordinary or unprecedented circumstances, is sufficient proof of unseaworthiness to entitle a seaman injured thereby to recover, if such breaking is the proximate cause of the accident.

*Holding, Masten, Duncan & Leckie, for plaintiff in error.  
. Snyder, Henry, Thomsen, Ford & Seagrave, for defendant in error.*

METCALFE, J.

Heard on error.

The plaintiff below, defendant in error here, recovered a judgment against the defendant below, plaintiff in error here, for alleged negligent acts of the defendant in causing the death of plaintiff's decedent, Jens Anderson.

Anderson was mate on the steamship Lewiston, a vessel owned by the defendant company, engaged in carrying passen-

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\* Motion to require the Court of Appeals to certify its record in this case overruled by the Supreme Court, June 8, 1920.

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gers and freight on the great lakes. The Lewiston sailed from the port of Marquette on October 1, 1917, bound for Cleveland, with a cargo of iron ore. In a storm occurring during the voyage Anderson was washed overboard and drowned.

All grounds of negligence alleged in the petition were eliminated from the case during the trial except the one charging that the death of Anderson was "caused by the defendant's unlawful conduct and negligence, of which decedent neither knew nor had the means of knowing, in causing said steamer to clear and sail from Marquette while said steamer was unseaworthy."

The unseaworthiness claimed was in a defective rail which gave way during the storm. The rail in question was described by the captain of the ship as an "oak rail fastened to an angle-iron which runs on the top of the bulwarks with the flange in board. The oak rail is bolted through this angle-iron with three-quarter inch bolts and screwed fast with nuts in under the angle-iron. The sections are fastened to one another by scarf thirty-two inches long. These scarfs are bolted with two-by-two bolts right through the scarf through the plank edgewise, and at the end of each scarf there is an eight-inch spike driven to hold the end of each scarf."

The rail was two to three inches thick and eight inches wide. During the storm a heavy wave washed over the vessel and after it subsided the rail was found to be gone and the mate had disappeared and was not seen again.

The rail was put in by the Buffalo Dry Dock Company the year before, and the ship had been inspected by Government inspectors about four months before, and passed as seaworthy. There was no direct evidence showing want of ordinary care in constructing the rail, or in its inspection, and there is no evidence that the storm, though heavy, was greater than the vessel would be expected to meet and stand in an ordinary voyage. It was not unprecedented, so that the question here presented is, whether the breaking of the rail, if unexplained, sufficient proof of unseaworthiness to entitle plaintiff to recover, provided, of course, that such unseaworthiness was the proximate cause of the accident?

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The decisions of the various courts upon the questions here considered are not altogether harmonious and we shall not attempt to discuss them at length, for out of the great mass of authorities cited some recognized principles are fairly deducible, which are decisive of the questions before us.

First, the owner of the vessel is liable to an indemnity for injuries received by a seaman in consequence of the unseaworthiness of the ship. *Osceola*, 189 U. S., 158, and *Chelentis v. Luckenbach Steamship Co.*, 247 U. S., 372.

Second, the rule that the ship must be seaworthy is for the protection of the seamen.

"The seaman is entitled to safe appliances." *Corrado v. Pederson*, 249 Fed. 165.

"It is the duty of a shipowner, for the purposes \* \* \* of a voyage \* \* \* to furnish a vessel with the usual and necessary appliances in such condition and repair as reasonably to attain the objects intended; in a word, the vessel as an entirety must be seaworthy; and the owner's duty in this behalf is positive and non-assignable." Warrington, J., in *Thompson Towing & Wrecking Assn. v. McGregor*, 207 Fed., 209-211.

Third, no exact definition of seaworthiness can be made; but as applicable to the instant case it may be said to mean failure of the owner of the vessel to use ordinary care in the construction or care of the rail in question, so as to render it of a degree of efficiency required for the purpose for which it was designed under ordinary circumstances.

Fourth, whether or not ordinary care was used was a question for the jury.

Fifth, the fact that the rail broke under the impact of the wave under the circumstances calls for an explanation on the part of the owners of the vessel, and whether that explanation was sufficient to relieve them was a question for the jury. *The Globe Steamship Co. v. Moss*, 245 Fed., 54; *Corrado v. Pedersen*, 249 Fed., 165; *Schooner Robert Lewers Co. v. Kekauoha*, 114 Fed., 849, and *Yoxford*, 33 Fed., 521.

It is needless to bring into requisition the somewhat over-worked doctrine of *res ipsa loquitur* in support of the last

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proposition. In the face of the fact that the rail did not answer the purpose for which it was constructed, that it broke under a test which it was required to withstand, it would be putting an altogether onerous burden on the plaintiff to require him to go further and show that some workman of the Buffalo Dry Dock Company the year before had failed to do his duty, or that some seaman had not properly cared for the rail. These facts were not within the knowledge of the plaintiff, but if they existed should have been within the knowledge of the defendant. It was the duty of the defendant to its seamen to make the ship seaworthy. If, as a matter of fact it was not seaworthy, the defendant was the only one who could explain that fact. Admitting the presumption of seaworthiness when the vessel sailed, that presumption must fall when the fact appears otherwise.

If our statement of the law is correct, was the plaintiff entitled to recover? To entitle her to a recovery the jury were required to find that the evidence offered in explanation of the broken rail was insufficient; that is, such evidence was not at least equal in weight to the evidential value of the fact itself (*Klunk v. Hocking Valley Ry.*, 74 Ohio St., 125), and to find by a preponderance of the evidence that the breaking of the rail was the proximate cause of the accident.

Can this court say that the finding of the jury on these questions was clearly and manifestly against the weight of the evidence? The testimony is to the effect that the rail was renewed in the usual way about a year before; that it had been cared for in the usual way; that it was inspected by Government inspectors and passed as seaworthy. The witness McQuain testifies that on the morning of the accident the captain ordered him to go below and get some wedges to be used in fastening down some of the hatches. When he came up with the wedges, to quote his own language, "I see somebody lying along the rail and then there was another sea boarded her and after she cleared up I didn't see anybody." The witness, McGovern, says that he and Anderson were fixing number six hatch at the time the waves struck the ship, and adds, "I see a big wave coming and I started on the run and jumped

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on a lifeboat. The sea filled her up and swept right over her and as soon as I got on top I looked aft to see where he was and I didn't see him."

The testimony of Captain Nelson and other witnesses is not materially different and they all concur that after the heavy wave had struck the ship Anderson had disappeared and the rail was gone. No witness other than McQuain testified to seeing any one lying by the rail, and his testimony may be somewhat discredited on that point, but the concurrence of all the witnesses as to the disappearance of Anderson and the breaking of the rail occurring about the same time must have led the jury to connect the two facts as cause and effect, and we do not feel that we are justified in saying that they were wrong. The rail broke and contemporaneously with that fact Anderson disappeared.

The charge of the trial court is excepted to and our attention is called to the following language as especially objectionable:

"In this connection I say to you that the breaking of the rail in question and the circumstances under which it occurred, is some evidence tending to prove that the defendant was negligent in the respects that I have stated and submitted to you. It is for you to determine how much, if any, weight such evidence is entitled to."

It is objected to this language that the effect was to indicate to the jury that the rail was insecure and that the defendant had failed to use ordinary care to provide a secure rail.

We do not think that that is the effect of the language used. The trial judge might well have said to the jury that the breaking of the rail, if unexplained, was sufficient proof of unseaworthiness. Instead of that, however, he left it to the jury to determine the weight and effect of that evidence. The charge properly placed the burden of proof on the plaintiff and left it to the jury to determine the weight and effect of the evidence. This could not have been prejudicial to defendant, and the judgment is affirmed.

FARR and POLLOCK, JJ., concur.

**DOCTRINE OF LAST CHANCE AND ITS LIMITATIONS.**

Court of Appeals for Hamilton County.

NOTKIN, ADMX., v. BARDES, EXR.

Decided, April 7, 1919.

*Negligence—Where Concurrent the Doctrine of Last Chance Without Application Until Plaintiff's Peril is Discovered.*

The doctrine of last chance has no application in a case where the negligence of plaintiff was concurrent with that of the defendant, but applies only after the discovery by defendant of plaintiff's peril.

*Howard Bevis and Peck, Shaffer & Williams*, for plaintiff in plaintiff in error.

*Robertson, Buchwalter & Oppenheimer*, for defendant in error.

CUSHING, J.

Heard on error.

This is an action for wrongfully causing the death of Israel Notkin, a minor ten years of age. The petition charges that defendant's automobile was being driven south on Elm street, between Eighth and Seventh streets, without a warning of any kind; that it was driven at a high, dangerous and excessive rate of speed; and that it was being so driven when the driver saw, or, in the exercise of ordinary care, should have seen, Israel Notkin, in time to have avoided striking him.

It is established that the automobile was proceeding south on the west side of Elm street; that at least two automobiles were parked on that side of Elm street, about halfway between Seventh and Eighth streets; that the boy had a scuffle with a larger boy on the sidewalk; and that on leaving the sidewalk on the west side of Elm street, after the scuffle, he went east between the parked automobiles and was injured before he reached the west rail of the street car tracks.

The evidence is conflicting as to the location of defendant's automobile at the time, and as to whether the boy walked,

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ran or darted out between the parked automobiles; also as to whether or not the accident happened on account of such darting out, or whether the boy was walking across or standing in the street at the time of the accident. The verdict was for the defendant. The jury must have found that the boy ran or darted out, that the driver of the automobile did not and could not have known of the boy's movement, and that it was an inevitable and unavoidable accident so far as the driver of the automobile was concerned. On the facts stated it can not be said that the verdict was against the weight of the evidence, unless there was error as charged. Counsel for plaintiff in error rely on the following assignments of error for a reversal:

1. The verdict (in view of the last-chance doctrine) was against the weight of the evidence.
2. Refusal to give special charge number six, stating the doctrine of last chance as applied to this case.
3. Errors in the general charge relating to proximate cause and last-chance doctrine.
4. Refusal to give special charge number five, to the effect that it was not unlawful for the deceased child to attempt to cross the street in the middle of the block.

The first, second and a part of the third assignments of error relate to the last-chance doctrine.

Special charge number six is as follows:

"If you find from the evidence that after Israel Notkin had reached a place of peril in the street in front of the automobile where he was in danger of being struck by it, and could not thereafter save himself, the chauffeur could then, in the exercise of ordinary care and watchfulness, have seen Israel Notkin in such position of peril, and that there was then sufficient space between the automobile and Israel Notkin to have permitted the chauffeur in the exercise or [of] ordinary vigilance to stop or check the automobile without striking Israel Notkin, and if you further find from the evidence that the chauffeur failed to use such ordinary care and watchfulness to discover said Notkin or stop or check the automobile, and as a result thereof the automobile struck and killed Israel Notkin, the plaintiff is entitled to a verdict in this case."

The doctrine of last chance has no application in a case where the negligence of plaintiff was concurrent with that of the defendant. *Drown v. The Northern Ohio Traction Co.*, 76 Ohio St., 234; *Bejac v. The C., P. & E. Ry. Co.*, 23 C. C., (N. S.), 475, affirmed, 90 Ohio St., 409; *Galati v. The Erie Railroad*, 23 C. C., (N. S.), 63; *Henry v. The C., L. & A. Elec. St. Rd. Co.*, 23 C. C., (N. S.), 40; *Harris v. The Mansfield Railway, Light & Power Co.*, 21 C. C., (N. S.), 209, and *Goodman v. The Cleveland Elec. Ry. Co.*, 16 C. C., (N. S.), 208.

The special charge contains the same error as that passed upon in the case of *Luebbering, Admr., v. Whitaker, ante*. The doctrine of the last chance is only applicable after the discovery by defendant of plaintiff's peril. The special charge was properly refused.

Plaintiff in error requested special charge number five as follows:

"It was not unlawful for Israel Notkin to attempt to cross the street in the middle of the block."

This charge was refused. The question presented by this charge was not an issue in this case, made by either the pleadings or proof. The refusal to give it does not require a reversal.

It is claimed that the court erred in its general charge in stating the law of proximate cause. That term has been defined in so many cases that it need not be repeated here. It is the law that a charge should be a plain, distinct and unambiguous exposition of the law applicable to the case, as made by the pleadings and proof. Therefore courts should refrain from stating what is not included in proximate cause, nor should they point out or emphasize any particular facts in defining proximate cause.

On consideration of the record we conclude there are no prejudicial errors. The judgment will therefore be affirmed.

SHOHL, P. J., and HAMILTON, J., concur.

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## RECOMMENDATIONS OF MERCY BY JURIES.

Court of Appeals for Hamilton County.

SHELTON v. STATE OF OHIO.

December 15, 1919.

*Criminal Law—Recommendation of Mercy is a Privilege of the Jury—  
May Not be Made the Subject of Argument by Counsel.*

The question of mercy as provided in Section 12400, General Code, defining first degree murder, is not a proper subject for argument by counsel at the trial of the case to the jury, but is a privilege to be exercised by the jury only after they have found defendant guilty of murder in the first degree.

*M. C. Lykins, and James G. Stewart, for plaintiff in error.  
Louis H. Capelle, Prosecuting Attorney, and Charles S. Bell,  
Assistant Prosecuting Attorney, for defendant in error.*

HAMILTON, J.

Heard on error.

Plaintiff in error, Ludie Clifford Shelton, *alias* James Shelton, was convicted in the court of common pleas of Hamilton county of murder in the first degree on a count in the indictment charging him with the killing of William H. Dieters, while said plaintiff in error was prepeprating or attempting to perpetrate a robbery.

It appears from the record that the decedent, Dieters, a police officer, while on duty as such, was killed on Freeman avenue in the city of Cincinnati about 11:30 p. m., on the night of August 28, 1918. It appears that the plaintiff in error, Shelton, together with a man named Chandler, were on the west side of Freeman avenue, acting in a suspicious manner; that Dieters, the police officer, met them and stopped them, inquiring as to where they were going and what they were doing at that time of the morning. Not giving a satisfactory answer, the officer made some examination of Shelton, but

did not discover a revolver which Shelton had in his trousers on the right side of the waist band. Thereupon the officer turned his attention to Chandler, and, while searching Chandler, Shelton drew his revolver, pointing it at the officer and ordering him to throw up his hands, which the officer did, and then he, Shelton, ordered Chandler to take from the officer his gun. Chandler, in obedience to the order of Shelton, put his hand in the pocket of the officer, but instead of getting his revolver took his flashlight. At that time the officer moved for some purpose, wherupon Shelton fired the shot which struck the officer near the heart, passing through the diaphragm, resulting in his death while on the way to the General Hospital. Shelton and Chandler ran, and were at liberty for some time, but were later apprehended and brought to trial.

The only defense offered at the trial was Shelton's claim that he did not intend to shoot the officer, that he wanted to take the officer's revolver from him so that he could get away, but that his, Shelton's revolver was accidentally discharged.

During the argument of the case to the jury counsel for defendant undertook to argue that under certain conditions a jury had a right to consider mercy, but was interrupted by the trial court and was denied the right to argue the question of mercy to the jury.

Plaintiff in error urges that the verdict and judgment are against the weight of the evidence. It would serve no purpose to enter into an analysis or discussion of the evidence, as the facts are briefly above set forth. We have carefully read the record, keeping in mind the importance of the case before us and we find the verdict and judgment to be fully sustained by the evidence.

The question raised by counsel for plaintiff in error on the refusal of the court at the trial to allow counsel for defendant to argue the question of mercy to the jury is not without difficulty. The statute of Ohio (Sec. 12400 G. C.) provides:

"Whoever, purposely, and either of deliberate and pre-meditated malice, or by means of poison, or in perpetrating or attempting to perpetrate rape, arson, robbery or burglary,

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kills another is guilty of murder in the first degree and shall be punished by death unless the jury trying the accused recommend mercy, in which case the punishment shall be imprisonment in the penitentiary during life."

This question has never been passed upon directly by the courts of the state of Ohio, nor by the courts of other states having like provision of law on their statute books. It was held by the supreme court of Ohio in *State v. Ellis*, 98 Ohio St., 21, that the question of mercy was not a proper subject upon which to examine a prospective juror upon his *voir dire*.

In the case of *State v. Thorn*, 39 Utah, 208 (117 Pac. 58), the supreme court held it to be improper for the trial court to charge the jury in such a way as to instruct its members how to consider the question of mercy. The court used the following language:

"It undoubtedly is the law, that the jury, in the event they found the prisoner guilty of murder in the first degree, had the absolute right to recommend a punishment of life imprisonment, and that the making or withholding of the recommendation was a matter entirely within their discretion to be exercised in any manner and for any reason they saw fit, and that they should be left free to dispose of the question without any intimation of the court as to what should control or influence them in reaching a conclusion upon it."

In the case of *People v. Kamaunu*, 110 Cal., 609 (42 Pac. 1090), on the question of the discretion of the jury to recommend mercy, the court in the opinion used the following language:

"This discretion is given to the jury, and the court can not direct or advise them upon the subject further than to inform them of their function."

In the case of *Newton v. State*, 21 Fla., 53, at page 101, the court say in the opinion:

"But after stating to the jury that the recommendation to mercy is in the discretion of the jury, where the law has

placed it, it is improper to attempt to control them in its free exercise according to their own judgment of the merits of the case. The law is positive. If a majority of the jurors recommend to mercy, by whatever motives they may be actuated (and these motives are not circumscribed), the court is bound to heed their verdict, and pronounce sentence accordingly."

In the case of *Winston v. United States*, 172 U. S., 303, at page 313 of the opinion, the court say:

"The instructions of the judge to the jury, in each of the three cases now before this court, clearly gave the jury to understand that the act of Congress did not intend or authorize the jury to qualify their verdict by the addition of the words *without capital punishment*, unless mitigating or palliating circumstances were proved.

"This court is of opinion that these instructions were erroneous in matter of law, as undertaking to control the discretionary power vested by Congress in the jury, and as attributing to Congress an intention unwarranted either by the express words or by the apparent purpose of the statute."

In the case of *State v. Ellis, supra*, the court make use of the following language:

"The decisions of course are quite uniform that the trial judge may not advise or direct the jury touching a recommendation of mercy; and, if the judge may not do so, why should counsel be permitted to commit the jurymen in advance, either one way or the other, touching such recommendation? *The jury should be left entirely free to consider that question after they have agreed upon a verdict of murder in the first degree.*"

While, as above stated, the cases cited and quoted from do not decide the precise question, they do show the interpretation of the statute to mean that the jury should be left alone to determine within their own conscience, without rhyme or reason, the recommendation of mercy. The question of mercy is not one to be considered until after the agreement of a verdict of guilty. Any discussion, therefore, by counsel or by the court would necessarily be predicated upon the proposition

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that the defendant was to be found guilty. When counsel for defendant present an argument to the jury appealing to them for a recommendation of mercy, the question immediately presents itself as to why, if the defendant is innocent, such a proposition should be presented at the time. The defendant would be immediately placed at the disadvantage of having counseL, who are there to defend, conceding by their argument a point against him. We again refer to the *Ellis case, supra*, as supporting this conclusion. The language used by the court is:

"The jury should be left entirely free to consider that question after they have agreed upon a verdict of murder in the first degree."

If we are to be guided by the general rules relative to arguments to the jury, it becomes clear at once that the argument on the question of mercy would be improper. The rule is that counsel may argue to the jury only from the evidence submitted in the case and the reasonable deductions to be made therefrom. Appeal to the passion and prejudice of the jury has no place in the trial of a case. It has been uniformly held that the recommendation of mercy is not based upon mitigating or palliating circumstances, nor the evidence in the case. Under this rule the only purpose an argument on the question of mercy would serve would be to appeal to the passion and prejudice of the jury, without regard to the evidence or the reasonable deductions to be made therefrom. If counsel for defendant is permitted to make an appeal to the sympathy of the jury on the question of mercy, counsel for the state would have the right to make an argument as to why mercy should not be extended, and the arguments of counsel, instead of serving their lawful purpose, would degenerate into an appeal on the one hand to the sympathy of the jury and on the other hand to their prejudices.

We are, therefore, of opinion that the question of mercy as provided in the statute is a privilege to be exercised by the jury, only after they have found the defendant guilty of mur-

der in the first degree, and the question has no place for consideration until after this has taken place. It has been held that the court may call their attention to this provision of the statute, but can go no farther, and that it is not error to omit any mention of this provision of the statute.

We are, therefore, of opinion that the question of mercy is not a proper subject for argument by counsel at the trial of the case to the jury, and that the court did not err in refusing to permit counsel for defendant to so argue.

Finding no error in the record, the judgment will be affirmed.

CUSHING, J., concurs.

SHOHL, P. J., dissenting.

The plaintiff in error is under a sentence of death based upon the verdict of a jury finding him guilty of murder in the first degree without recommendation of mercy.

During the course of the final argument of the cause to the jury his counsel undertook to argue to the jury that the accused should be accorded a recommendation of mercy. The court, in substance, forbade him to talk about mercy to the jury, and counsel excepted.

Section 12400 G. C., provides:

"Whoever, purposely, and either of deliberate and pre-meditated malice, or by means of poison, or in perpetrating or attempting to perpetrate rape, arson, robbery or burglary, kills another is guilty of murder in the first degree and shall be punished by death unless the jury trying the accused recommend mercy, in which case the punishment shall be imprisonment in the penitentiary during life."

It will be noted that in the trial of a case wherein a defendant is charged with murder in the first degree, the jury may have a twofold function. They must determine the guilt or innocence of the accused. If they find the accused guilty, they must fix the penalty by their form of verdict. The form of verdict alone determines whether the offense shall be pun-

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ishable by death or by imprisonment in the penitentiary during life. While under the Ohio Criminal law the jury has ordinarily nothing to do with the determination of the amount of the punishment, the law in some states gives them the power. See 16 Corpus Juris., 933, 1111. In Ohio the jury have the function of fixing the penalty in first degree murder cases only. The legal effect of the recommendation of mercy is to fix the punishment. *State v. Schiller*, 70 Ohio St., 1.

One charged with a capital or otherwise infamous crime has secured to him by both the federal and state constitutions the right (1) to a trial by jury; (2) to compulsory process for obtaining witnesses in his favor; and (3) to the assistance of counsel upon trial. See Article 3, Sec. 2, and Arts. 5 and 6 of the amendments to the Constitution of the United States, and Art. 1, Secs. 5 and 10, Constitution of Ohio. Important as the right to a trial jury is, its purposes would not be fully accomplished without the concomitant rights of compulsory process and the assistance of counsel. It is our duty to see that none of these rights is impaired, or denied to any one entitled to the benefit of them. They are the product of the wisdom and humanity of the founders of this government.

How far the considerations of age, sex, ignorance, illness or intoxication, of human passion or weakness, of sympathy or clemency, or the irrevocableness of an executed sentence of death, or an apprehension that explanatory facts may exist which have not been brought to light, or any other circumstances whatever, should be allowed weight in deciding the question whether the accused should or should not be capitally punished is committed to the discretion of the jury and of the jury alone. The authority of the jury to decide that the accused shall not be punished capitally is not limited to cases in which the court, or the jury, is of the opinion that there are palliating or mitigating circumstances; but it extends to every case in which, upon a view of the whole evidence, the jury is of opinion that it would not be just or wise to impose capital punishment. *Winston v. United States*, 172 U. S., 303, 313, and *United States v. Williams*, 103 Fed., 938.

The right to defend with counsel includes the right to have counsel argue fully such matters as may be favorable to the accused. *Dille v. State*, 34 Ohio St., 617, and 16 Corpus Juris., 887.

Since the jury have the power to "change the punishment," the accused has the right to have presented to their attention any matters that they might properly consider in forming a judgment.

The effect upon the right of the prosecution to reply to such argument in kind, we need not now decide.

Counsel for the state rely upon the decision of *State v. Ellis, supra*. The fact that counsel are not permitted to inquire of a prospective juror whether he would be willing to consider recommendation of mercy, and thus "commit the jurymen in advance," is not inconsistent with the right to have presented to the juror at the proper time such matters as might warrant him to consider whether mercy should be recommended. The jury must be left free in the determination of that question, but this function is vested in them as a protection to the accused.

I am of opinion that in refusing to permit counsel for the accused to argue to the jury on the subject of mercy, the court abridged the constitutional right of the defendant. I therefore dissent from the decision of the court.

**COMPETENCY OF TESTIMONY WHEN ADVERSE PARTY  
IS ADMINISTRATOR.**

Court of Appeals for Knox County.

Judges Allread, Farnedding and Kunkle of the Second Appellate District,  
sitting by designation in place of Judges Shields, Houck  
and Patterson of the Fifth Appellate District.

**W. W. WALKEY, ADMR., v. ELVA LONEY.**

Decided, November 13, 1919.

*Evidence—Making Children Parties—Does not Render Their Testimony  
Incompetent in Suit by Administrator, When.*

In an action against an administrator to recover judgment and possession of certain personal property, the children of the deceased, although named in the caption of the petition as parties defendant are not necessary parties, and are therefore not incompetent witnesses under Section 11495, General Code.

*P. A. Berry, F. O. Levering and Huston & Hutchison*, for plaintiffs in error.

*J. B. Graham and Robert L. Carr*, for defendant in error.

**KUNKLE, J.**

Heard on error.

In the common pleas court cases Nos. 10,341, 10,506 and 10,563 were submitted together.

We shall not attempt to state the facts involved in each of these cases in detail. It is unnecessary as counsel are thoroughly familiar with the same.

In brief, however, in case No. 10,341 Elva Loney brought suit against W. W. Walkey as administrator of the estate of Julia A. Loney, deceased, and sought to recover judgment and possession of certain personal property which was in the hands of Julia A. Loney at the time of her death and which came to her from the estate of her husband, Reuben C. Loney.

Elva Loney in his petition alleged in substance that under a contract and power of attorney executed by Reuben C. Loney,

he, the said plaintiff, was entitled to said property after the death of said Julia C. Loney.

The prayer of the petition is as follows:

"Wherefore plaintiff prays that there may be ordered and adjudged that the defendant W. W. Walkey, as administrator of the Estate of Julia A. Loney, deceased, pay to him the sum of \$4,393.91 together with interest on the same from June 10th, 1910, and to turn over to him or cancel all notes executed by him to Reuben C. Loney or to his estate."

Case No. 10,506 is an appeal from an order made by the probate court of Knox County in the matter of the estate of Reuben C. Loney overruling a motion made by Elva Loney, one of the executors of Reuben C. Loney asking leave to open up and correct the first partial account of the executors of Reuben C. Loney, deceased, and also overruling in all substantial particulars the exceptions filed by Elva Loney to the affidavit of W. W. Walkey, administrator of the estate of Julia A. Loney, in lieu of a final account of such administrator.

Case No. 10,563 was also an appeal from an order of the probate court of Knox county sustaining the exceptions of W. W. Walkey as administrator of the estate of Julia A. Loney, deceased, to the second partial account of Elva Loney, executor under the will of Reuben C. Loney, and in making a finding against said Elva Loney upon the said second partial account.

The principal controversy between the parties relates to the validity and effect of the alleged contract and power of attorney which it is claimed was executed by Reuben C. Loney in his lifetime and the provisions of which it is further claimed were fully performed by Elva Loney during the lives of Reuben C. Loney and Julia A. Loney.

Elva Loney claims that in consideration of the performance by himself of certain services specified in said contract and power of attorney that he was to receive the personal property therein designated at the death of Reuben C. and Julia A. Loney.

During the progress of the trial the defendants, Grace Doup (Record, page 35) and Geneva Pealer (Record, page 51) were

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offered as witnesses. They were daughters of Julia A. Loney, deceased. The trial court upon the objection of plaintiff below refused to permit these witnesses to testify and it is urged by counsel for plaintiff in error that the trial court erred in such ruling.

In case No. 10,341 both of these persons were named as parties defendant in the caption of the petition but no allegation was made in the body of the petition against either of them.

Mrs. Spohn, another daughter, was also named as a party defendant in the caption of the petition but no allegation was made against her in the body of the petition and she was not served with summons.

Neither Mrs. Doup, Mrs. Pealer nor Mrs. Spohn filed an answer.

The only answer filed was by W. W. Walkey as administrator of the estate of Julia A. Loney, deceased. It is claimed these persons were incompetent witnesses by reason of the provisions of Section 11,495 G. C.

This Section provides that:

"A party shall not testify when the adverse party is the guardian or trustee of either a deaf and dumb or an insane person or of a child of a deceased person, or is an executor or administrator, or claims or defends as heir, grantee, assignee, devisee or legatee of a deceased person, except;" etc., etc.

It will be observed that the adverse party in this case is Elva Loney, not the administrator, as these two witnesses and the administrator were joined as defendants. Elva Loney is not claiming in this case as an heir, devisee or legatee but is claiming nuder a contract and power of attorney alleged to have been executed by his father.

Under the reasoning found in the case of *Elliott v. Shaw*, 32 O. S., Reports, 431, it seems apparent that the adverse party, namely, Elva Loney, could not be considered as a grantee. This then eliminates all of the provisions of said section except the term "assignee."

Assuming that Elva Loney could be considered as an assignee, which we consider doubtful, there is another reason which

forces us to the conclusion that the trial court erred in rejecting the testimony of these two witnesses.

In the case of *Wolf v. Powner*, 30 O. S. Reports, page 472, Judge Scott at page 476 of the decision says:

"We all concur in the opinion that the parties intended to be excluded from testifying by this section are the real and not mere formal, nominal and wholly unnecessary parties. This section only prohibits a party from testifying in an action where the adverse party sustains certain relations or characters or come within certain specified descriptions."

See also reasoning of Judge Price in the case of *Powell v. Powell*, 78 O. S., 331. Also following cases; *Keyes v. Gore*, 42 O. S., 211; *Cochran v. Almack*, 39 O. S., 314 and 3 Ohio Circuit Court Reports, page 508.

We are of opinion that neither Mrs. Doup nor Mrs. Pealer were either necessary or proper parties to this proceeding. No relief was asked against either of them and no averment was contained in the petition which affected either of them. They were not referred to in the petition except to be named in the caption thereof and as to Mrs. Spohn she seems to have been so unnecessary that counsel for plaintiff did not even have her served with summons. No relief was asked against either of them. We can not see what relief could have been asked against either of them in a case of this nature. If the plaintiff is entitled to relief it will be necessary to work the same out through the administrator of Julia A. Loney. The administrator represents the estate of Julia A. Loney. Her daughters do not. The administrator was, therefore, the only real party in interest and we think the trial court erred in refusing to allow these two witnesses to testify.

The record does not fully disclose what the excluded testimony would have been and we are therefore unable to determine to what extent such testimony might bear upon the important questions of the execution and performance of the alleged contract and power of attorney.

In view of the fact that additional evidence may be offered upon these questions we do not deem it proper to express an opinion

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upon the weight of the evidence contained in the record now before us.

It is also claimed by counsel for plaintiff in error that case No. 10,341 can not be maintained for the reason that the plaintiff failed to file a claim with the administrator of the estate of Julia A. Loney, deceased, and have the same either allowed or rejected prior to the commencement of such suit.

An examination of the pleadings does not disclose any issue upon this question nor was a demurrer filed to the petition upon the ground that same did not state a cause of action.

In addition to the above we are of opinion that in a case of this nature it would not be necessary to file a claim with the administrator of the estate of Julia A. Loney and have same rejected before suit could be brought.

For error in excluding the testimony of Mrs. Doup and Mrs. Pealer the judgment of the lower court will be reversed and the causes will be remanded for new trial.

ALLREAD and FERNEDING, JJ., concur.

**LANDLORD LIABLE TO TENANT FOR DAMAGES DUE TO  
HIS NEGLIGENCE.**

Court of Appeals for Cuyahoga County.

**HALBREICH v. LAMB.**

Decided, February 11, 1918.

*Landlord and Tenant—Landlord Occupying Second Floor Liable for Damage to Goods of Tenant on First Floor—Caused by Water Percolating through First Floor Ceiling—Negligence of Landlord on Premises not Occupied by Tenant.*

1. A landlord who occupies the upper stories of a building, and leases the first floor and basement thereof to a tenant, is liable for negligently permitting water to percolate through the first floor ceiling, thereby damaging the tenant's goods; and the question of the landlord's omission of duty toward his tenant is one for the jury.
2. The rule of law that the relation of landlord and tenant is contractual and that therefore a landlord is not liable in tort on account of the condition of the premises leased, has no application to a case where the landlord's negligent acts take place in a portion of the premises which are not demised and result in damage to the tenant. *Shinkle, Wilson & Kreis Co. v. Birney & Seymour*, 68 Ohio St. 328, *Shindlebeck v. Moon*, 32 Ohio St., 264, and *Stackhouse v. Close et al.*, 83 Ohio St., 339, distinguished.

*Ezra Brudno*, for plaintiff in error.

*F. F. Gentsch*, for defendant in error.

**LIEGHLEY, J.**

Heard on error.

The parties stood in the same order below.

The plaintiff, Sol. M. Halbreich, filed his statement of claim in the court below, alleging that he occupied the first floor and basement of the premises of defendant, Mark Lamb, under a lease, which premises are located at the corner of Ontario street and Huron road, and that the relation of landlord and tenant existed between them on the day in question in this law-suit;

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that the stories above the first floor were used, occupied and under the control of the defendant at that time; that on the 4th day of February, 1917, the defendant carelessly and negligently permitted water to percolate through the ceiling of the store occupied by the plaintiff, which water damaged his goods and stock of merchandise then therein; that the plaintiff called the attention of the defendant to the water leaking through the ceiling, but that the defendant disregarded the warning and permitted the water to continue to percolate for a period of more than two hours; and that he is entitled to damages to his stock of goods occasioned by the water through the negligence of the defendant.

Defendant filed an answer in which he admits that on said day he had the use, occupancy and control of the upper stories of said block; that on said day a water pipe broke in the private apartments of the defendant on the third floor of said building, due to the fact that the gas company failed to furnish sufficient gas to heat the building, and that in consequence thereof the pipe froze and broke; and asserts that the breaking of the pipe was not due to any negligence on his part but was due to the default of the gas company; and that upon discovery of said break he used the utmost diligence to turn off the water in the building. He denies generally all the statements of fact contained in the statement of claim, not expressly admitted.

The case came on for trial, and a jury was empaneled. The defendant then objected to the introduction of any evidence and moved the court for a judgment on the pleadings, which motion was granted and judgment was entered for the defendant. Error is prosecuted to this court to reverse this judgment.

To sustain the judgment of the court below, counsel cites and relies upon the case of *Shinkle, Wilson & Kreis Co. v. Birney & Seymour*, 68 Ohio St. 328, the syllabus of which reads as follows:

"The relation of lessor and lessee arises out of contract, and, where there is neither express warranty nor deceit, the latter cannot maintain an action against the former on account of the condition of the premises hired."

In addition to the above authority we cite *Shindelbeck v. Moon*, 32 Ohio St. 264, and *Stackhouse v. Close*, 83 Ohio St. 339.

These citations are authority for the rule that the relation of lessor and lessee is one of contract; also that the tenant can not maintain an action against the landlord on account of the condition of the premises leased, in the absence of deceit, fraudulent concealment or express warranty.

An examination of these authorities, however, will disclose that the facts in each case relate to the demised premises. Each case, and the rule announced in each, limits the application thereof to the condition of the premises hired, and in neither of the cases is the rule extended to the condition of premises outside of and beyond the demised premises.

The pleadings in this case clearly show that the demised premises consisted of the first floor and basement, and that the defendant had the use, occupancy and control of the stories above the one leased to plaintiff. The break in the pipe occurred in the private apartments of the defendant, over which the plaintiff exercised no control and into which he had no right of entry to make repairs, and which was in no sense a part of the subject-matter involved in the contract of lease. As to the first floor covered by lease the relation of plaintiff and defendant was contractual, and no question of negligence arises in respect to that part of the premises. Whether or not any rule of negligence may be invoked and applied for an omission of duty on the part of the defendant in his private apartments resulting in damages to the property of the plaintiff on the first floor is one of fact to be determined from the proof in the case, and the authority relied upon by counsel as controlling in this law-suit has no application whatsoever to the situation presented in the pleadings in this case.

The judgment is reversed for error in sustaining the motion for judgment on the pleadings, and the cause is remanded to the court below for proceedings according to law.

GRANT and DUNLAP, JJ., concur.

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**NOT VESTED WITH GENERAL JURISDICTION.**

Court of Appeals for Hamilton County.

**RENDIGS, COMMISSIONER OF BUILDINGS, ET AL. v. DEVOU.\***

Decided, November 24, 1919.

*Insolvency Court not Given General Equitable Jurisdiction—May not Enjoin Enforcement of an Order for Vacation of Buildings.*

1. The court of insolvency of Hamilton county, being a regularly and legally established court of record, its judgments are subject to review by the court of appeals under Article IV, Section 6 of the Ohio Constitution of 1912.
2. The court of insolvency of Hamilton county is not vested with general equitable jurisdiction in injunction cases, and is without jurisdiction to hear and determine injunction proceedings brought to restrain the commissioner of buildings from enforcing an order for the vacation of certain buildings.

*Saul Zielonka, City Solicitor, and Dennis J. Ryan, Assistant City Solicitor, for plaintiffs in error.*

*Crosley & Rogers, for defendant in error.*

**HAMILTON, J.**

Heard on error.

Defendant in error instituted a proceeding in the court of insolvency of Hamilton county to restrain the commissioner of buildings and the chief of police from enforcing an order for the vacation of certain buildings, the property of the defendant in error, which the building commissioner claimed to be unsafe and unsanitary, which order the defendant in error refused to comply with, challenging the constitutionality of the ordinance of the city of Cincinnati providing for the regulation of tenement houses and other buildings. The plaintiff in error, defendant below, demurred to the petition on the

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\*Motion to require the Court of Appeals to certify its record in this case overruled by the Supreme Court, April 26, 1920.

ground that the court of insolvency had no jurisdiction of the subject of the action. The demurrer was overruled, and, the defendant below declining to plead further, judgment was entered for plaintiff below, from which judgment error is now prosecuted.

Defendant in error moves to dismiss this proceeding in error for the reason that the first sentence of paragraph 10 Sec. 1637, G. C., is unconstitutional in attempting to confer authority on this court to review on error the decision of the court of insolvency. The motion to dismiss and the error proceeding were presented at the same time and both questions are submitted for consideration. We will first consider the motion to dismiss the proceeding in error.

Jurisdiction to review a judgment is not conferred by paragraph 10, Section 1637, General Code. The authority for such review is provided by Art. 4, Sec. 6, of the Constitution, as follows:

"The courts of appeals shall have original jurisdiction in quo warranto, mandamus, habeas corpus, prohibition and procedendo, and appellate jurisdiction in the trial of chancery cases, and, to review, affirm, modify or reverse the judgments of the courts of common pleas, superior courts and other courts of record within the district as may be provided by law and judgments of the courts of appeals shall be final in all cases, except," etc.

The supreme court of Ohio in *Cincinnati Polyclinic v. Balch*, 92 Ohio St., 415, held that the general assembly has no power to enlarge or limit the jurisdiction conferred by the constitution of the state. This provision of the constitution specifies "other courts of record within the district." The insolvency court of Hamilton county, being a court of record within the district, is sufficient authority for the review of this case.

It is argued by counsel in support of the motion that if the error proceedings are entertained it would do violence to Art. 2, Sec. 26, which provides that all laws of a general nature must have a uniform operation throughout the state.

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It is further argued that the power conferred under Art. 4, Sec. 6, to review, is only conferred in accordance with the provision of Section 26; that there are but two courts of insolvency in Ohio, found only in Hamilton and Cuyahoga counties, and that they are not therefore within the provisions of Art. 2, Sec. 26. We do not think this position is tenable. The jurisdiction to review, affirm, modify or reverse the judgments of the courts of common pleas, etc., is contained in and limited to Art. 4, Sec. 6. Section 26 has to do only with acts of the legislature. The legislature by law established the insolvency court of Hamilton county, and the constitutionality of that law was upheld in the case of *State v. Archibald*, 52 Ohio St., 1. The insolvency court of Hamilton county being a regularly and legally established court of record, its judgments are subject to review under Art. 4, Sec. 6, and the motion to dismiss the error proceeding will be overruled.

The question remaining is: Did the court err in overruling the demurrer and entering judgment for the plaintiff below? This involves the question whether or not the court of insolvency is vested with general equitable jurisdiction in injunction cases. If the court is not so vested, it would be without power to enter the judgment in this case. It is argued by counsel for defendant in error that the insolvency court had authority to hear and determine this cause under paragraph 10, Sec. 1673 G. C., the provisions of which are as follows:

"10. Appeals may be taken to the court of appeals from orders, decrees and judgments, in such cases, and error may be prosecuted in the court of appeals in the manner and to the extent provided in such cases respectively when pending in the court of common pleas. All laws giving authority to issue injunctions, and regulating the practice in the common pleas court in such cases prescribing the form and effect of its orders, decrees and judgments, and authorizing and directing the execution thereof, shall be held to extend to the court of insolvency."

It is claimed that under this paragraph general equity powers in injunction cases are conferred upon the insolvency

court; that the intention of the legislature as conveyed by the last part of paragraph 10 is to give the court of insolvency the power granted to the common pleas court in all injunction matters.

It is claimed that in the wording of the paragraph, "all laws giving authority to issue injunctions, and regulating the practice in the common pleas court *in such cases* prescribing the form and effect," etc., the phrase *in such cases* means injunctions, or might be read "and regulating the practice in the common pleas court in injunction cases." We do not think the section will bear that construction. The insolvency court is a court of limited jurisdiction and possesses only such powers as are conferred by statute, and such equity powers as are necessarily incident to the execution of such powers. The powers conferred are contained in the first nine paragraphs of Section 1637. Then follows the paragraph which defendant in error claims to confer general equity powers. The section is to be construed as a whole. Paragraph 10 undertakes to provide for the procedure of the court with reference to the powers granted in the nine preceding paragraphs. No injunctive power is conferred by the law. The court could only grant such preliminary injunctions in the exercise of its powers granted under the preceding paragraphs as are necessary for the execution of such powers. Bearing in mind that cases might arise in the exercise of the powers granted, which would require the use of the extraordinary power of injunction to give effect to its judgments, the legislature sought in paragraph 10 to provide for the procedure under those circumstances, none having been provided for in the preceding nine paragraphs. Recognizing the authority to issue injunctions by the court of insolvency, as above stated, the legislature provided how this extraordinary remedy might be exercised. The latter part of the paragraph, that all laws giving authority to issue injunctions *in such cases*, refers to the nine preceding paragraphs, just as does the same phrase in the first sentence of paragraph 10. In other words, while at common law

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the court of insolvency may have sufficient authority to invoke the extraordinary remedy of injunction, in exercising the powers conferred upon it, the legislature out of abundant precaution has prescribed that in the exercise of those powers it shall be guided by the rules and practice of the court of common pleas in such cases.

It follows that the court of insolvency was without jurisdiction to hear and determine this case, and for that reason was without power to grant the injunction.

The injunction will be dissolved and judgment may be entered here sustaining the demurrer to the petition, and dismissing the petition for want of jurisdiction of the court of insolvency.

SHOHL and CUSHING, JJ., concur.

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#### LIMITATION AS TO TIME FOR APPEAL FROM THE INDUSTRIAL COMMISSION.

Court of Appeals for Cuyahoga County.

INDUSTRIAL COMMISSION V. PATTERSON.

Decided, March 11, 1918.

*Workmen's Compensation—Right to Participate in Insurance Fund Denied—Time for Appeal Runs from Order on Application for Rehearing.*

The industrial commission denied the right of a claimant to participate in the state insurance fund, and thereafter, on application for a rehearing, the commission adhered to its former action.

*Held:* That the thirty day limitation for appeal to the common pleas court, as provided by Section 1465-90, General Code, begins to run from the date of the order of the commission on the application for rehearing.

*Samuel Doerfler, Pros. Atty., and G. A. Howells, assistant Pros. Atty., for plaintiff in error.*

*Frederick A. Henry, for defendant in error.*

LIEGHLEY, J.

The parties stood in reverse order in the court below and for convenience will be mentioned herein as they there stood.

Elmer Patterson met his death on the 14th day of November, 1916, while in the employ of The Lake Shore Sawmill Company. The mill company had complied with the requirements of the workmen's compensation act. The plaintiff mother of said deceased, made application to defendant for an award, which was denied by the defendant on the 16th day of February, 1917. A few days later notice of the action of the commission was given to plaintiff by letter, which letter contained the following statement:

"If it is your desire to have the claim reopened after reading this statement of facts, upon notification we will send you the proper blank."

On March 8 application for rehearing was filed with the defendant, which application was finally decided on March 23, 1917. The final decision of the commission took the form of an approval and affirmance of its former action. An appeal was taken to the court of common pleas, April 19, 1917. Hearing thereof was thereafter had and resulted in a judgment for damages, attorney fees and costs, in favor of plaintiff, from which judgment error is prosecuted to this court by the defendant.

First, it is claimed in the briefs by defendant that the fatal injury was not received by the deceased in the course of his employment. This claim was not urged or insisted upon at the hearing.

Second, it is claimed that the appeal to the court of common pleas was not filed in time.

The act provides that the claimant shall file the appeal within thirty days after the notice of the final action of the board. Defendant claims that the entry of February 16 constituted the final action of the commission. The plaintiff claims that the rules promulgated by the commission provide for the filing of an application for hearing within thirty days after final action of the board, that said application for rehearing

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was entertained by the commission and its final action thereon constitutes the order from which plaintiff should and did appeal.

Rule 25 provides that an application for rehearing a claim may be filed within thirty days from the date of the order and finding of the commission complained of, and that when filed a time and place for hearing the same with notice to the parties shall be fixed, and, if, on rehearing, it appears to the commission that substantial justice has not been done, it has then full power to modify its former order. The essential procedural requirements were complied with in this case for the rehearing.

Section 1465-91 G. C. permits liberality in the proceedings of the commission.

Section 1465-69, paragraph 3, confers authority upon the board of awards to change or modify its finding of facts at any time.

Viewing this case from the standpoint of what was done, in chronological order, and with regard to the provisions of the act and the rule above referred to, it seems to us that the appeal was taken in time by plaintiff, and that the order of March 23, 1917, is the final action of the board. Otherwise Rule 25 would be beneficial to no one, excepting that it might be used to mislead claimants to permit the statutory time for appeal to elapse.

It is suggested by defendant that unless the requirements of the statute are strictly enforced, and that if a claimant be permitted to file a motion for rehearing and the statute begin to run from the action of the commission thereon, a claimant would have the instrument in his hands to delay indefinitely the conclusion of such a matter before the board. With this claim we do not agree. Suppose an order is made by the board adverse to a claimant. Then the claimant has thirty days under the rule to file an application for rehearing. Action on the application for rehearing is within the hands of the board, and if there be delay the blame therefor lies with the board. The rule affords the right to a claimant to file an application for a rehearing, and when a claimant avails himself of that right the

statutory time of thirty days for perfecting an appeal begins to run from the date of the final action on the application for rehearing. At most, sixty days plus the time that intervened from the date of the application for a rehearing and the date of a decision thereon by the board would be the limit, within which an appeal would have to be perfected, applying the act and the rules promulgated by the board.

It is true that statutes conferring a right of appeal must be strictly complied with, and the decisions are to this effect. But this rule has been held in the main to apply to an appeal from an inferior to a superior court. Such is not the case in this appeal. The functions of this board are administrative, and this is an appeal from an administrative board to a court. The appeal provided for in this act should be treated rather as the mode of removing a cause from an administrative to a judicial tribunal. *State v. Creamer*, 85 Ohio St. 349; 39 L. R. A. (N. S.) 694, and *Police v. Industrial Commission*, 23 C. C. (N. S.), 433.

Judgment affirmed.

GRANT and DUNLAP, JJ., concur.

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#### FALSE ANSWERS IN APPLICATION FOR FRATERNAL LIFE INSURANCE.

Court of Appeals for Montgomery County.

JOHN E. GOEHRING V. THE MACCABEES.

Decided, January 26, 1920.

*Mutual Benefit Societies—Construction of Statute Providing When False Answers in Application for Life Insurance Become Material.*

Section 9391, General Code, relating to answers to interrogatories in an application for life insurance, does not apply to fraternal insurance.

*Egan & Delscamp*, for plaintiff in error.

*Nevin & Kalbfus*, and *C. M. Horn*, for defendant in error.

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**KUNKLE, J.**

This is an action in which plaintiff in error, the beneficiary named in a certain fraternal insurance policy issued on the life of his son Clarence A. Goehring, seeks to recover from defendant in error the value of such policy.

It appears from the record that defendant in error tendered plaintiff in error the amount paid as premiums under the policy. The trial court instructed the jury to return a verdict in favor of defendant in error.

Such ruling was made by the trial court upon the ground that as suit was brought upon a fraternal insurance policy any untrue statements made by the applicant would vitiate the policy, whether such untrue statements were made intentionally or by mistake.

The trial court found that the undisputed testimony showed that Clarence A. Goehring, the insured, in his application for such insurance, stated that his mother had died of typhoid fever, whereas she died from tuberculosis; that said Clarence A. Goehring stated in his application for insurance that he had no brothers, whereas he had two brothers; that said Clarence A. Goehring stated in his application for insurance that none of the members of his family had died from consumption, whereas three of them, viz: his mother and two brothers, had died from tuberculosis.

It is claimed by counsel for plaintiff in error that this case should have been submitted to the jury, as there was at least a scintilla of evidence to support the claim of plaintiff in error.

We have carefully read the record in this case and are of opinion that the evidence fully warranted the findings of fact contained in the decision of the trial court, and if these findings are supported by the undisputed evidence then the court was justified in instructing a verdict unless Section 9391, General Code, applies to fraternal insurance.

Upon a careful consideration of this section of the Code and of the Ohio authorities, we are of opinion that the section does not apply to a fraternal insurance policy such as was sued upon in this case. 19 O.C.C.(N.S.), 355.

Under the policy in question the representations of the applicant were made warranties. The policy contains the following provisions:

"This certificate is issued because of an application for membership and medical examination furnished by the member in writing, signed by him, and warranted to be absolutely true in every particular as written, which application, medical examination, laws of the Association in force at maturity of contract, and this certificate, constitute the contract between the member and the Association."

The laws of defendant in error (Page 76 of Exhibit "R", Section 380), provide that—

"No benefit shall be paid on account of the death or disability of a member who has given untrue answers in his application for membership, provided, however, that a member who, in his application for membership, understated his age, in good faith and without any intention to deceive, shall not thereby forfeit his certificate, if he was under the age limit at the time of his admission. If he was above the limit of age at the time of his admission his membership shall be void from the beginning."

The case of *Insurance Company v. Pyle*, 44 O. S., 19, established the rule in Ohio as to a life insurance policy prior to the enactment of Section 9391, General Code.

We are of opinion that Section 9391, General Code, does not apply to fraternal insurance, and that under the undisputed testimony the trial court was justified in instructing a verdict.

In view of the final decision of the trial court, we do not think its ruling in reference to the opening and close of the case would constitute prejudicial error.

Finding no error in the record which we consider prejudicial to plaintiff in error, the judgment of the lower court will be affirmed.

ALLREAD and FERNEDING, J.J., concur.

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**PRIORITY OF COSTS OF ADMINISTRATION.**

Court of Appeals for Hamilton County.

**KLIMPER v. KLIMPER, ADMINISTRATRIX.**

Decided, January 19, 1920.

*Sale by Administrator to Pay Debts—Costs of Administration Prior to Claim of Mortgagee, When.*

Proceeds from the sale of realty by an administrator to pay debts of the decedent may properly be charged with court costs and expenses of the sale, the per centum and charges of the administrator in connection with the sale, allowance to the administrator for attorney's fees in connection with the sale, payment for sale bond, and compensation to the auctioneer and for special advertising. These payments have priority over a mortgage claim on the land so sold, when the proceedings to sell are in good faith and the mortgagee joins therein and the property is purchased by another than the mortgagee.

*David P. Schorr, for plaintiff.*

*Heilker & Heilker, for defendant.*

**HAMILTON, J.**

Heard on appeal.

This case is heard on appeal from an order of distribution entered in the court of common pleas of Hamilton county.

Dora L. Klimper, administratrix of the estate of Dorothea G. Klimper, deceased, filed her petition in the probate court of Hamilton county for leave to sell real estate belonging to the estate, and upon a showing that same was necessary to pay the debts of the estate obtained an order for such sale.

It was alleged that the debts were about \$5,230, that the charges of administration would amount to about \$350, and that the total value of the personal estate of the decedent was less than \$100.

All the heirs at law were made parties to the proceeding and consented to the sale of the property. Plaintiff, Henry

Klimper, held the mortgage on the real estate described in the petition, to secure the payment of five notes of \$500 each, aggregating \$2,500, made in 1899, on which there had been made only one payment of \$155. The principal and interest were somewhat in excess of \$4,000 at the time of the sale. The mortgagee filed his answer and cross-petition, made no objection to the sale of the real estate, and prayed that his interest as such mortgagee might be protected and his mortgage declared the first and best lien on the premises; and, if sold, that the proceeds arising from the sale be applied in payment of his claim as a first and best lien on the premises described.

Prior to the sale, the administratrix was required to execute a new bond which necessitated the payment of a premium of \$25.

The real estate, upon which the mortgage was held by Henry Klimper, was appraised at the sum of \$5,000. The real estate sold in the proceeding for the sum of \$3,975, which was somewhat less than the amount of the mortgage claim of Henry Klimper.

It appears from the record that one small piece of unencumbered real estate was offered for sale and no bids received, and is yet unsold.

The two pieces of real estate constituted all the real estate belonging to the estate.

It appears that there is some dispute as to the ownership of six shares of gas stock, as to whether the gas stock is a part of this estate; and that question has not been determined by the lower court.

The record and the agreed statement of facts show that the proceeding to sell was in good faith. The real estate was not purchased by the mortgagee, but was purchased by a third party, and the proceeds paid to the administratrix.

The question here arises on distribution of the proceeds of the sale. The points involved are the court costs and expenses of the sale, the percentum and charges of the administratrix in connection with the sale, the allowance to the administratrix of an amount for attorney's fees for legal serv-

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ices in connection with the sale, and an allowance for the payment of the sale bond. It is agreed that the amounts asked for, and as shown by the record, if proper charges against the proceeds of the sale, are reasonable.

Without undertaking to lay down a general rule that will apply to all cases, in view of the proceedings and facts above stated and disclosed by the agreed statement of facts and the record, under the provisions of Section 10809 G. C., and upon authority of *Stone v. Strong*, 42 Ohio St., 53, we hold:

First. That the costs and expenses of the sale are proper charges against the fund arising therefrom.

That the charge for additional bond required of the administratrix for the purpose of the sale amounting to the sum of \$25, is a proper charge against the fund arising from the sale.

That the amount of \$85.12, in compensation of the auctioneer and special advertising, is a proper charge against the proceeds of the sale.

That the amount of \$198.75 is a reasonable allowance to the administratrix for counsel fees, rendered in connection with the sale of the real estate, and is a proper charge against the proceeds of the sale.

That the administratrix is entitled to a percentum compensation for the sale of the real estate, but that such percentum is to be computed upon the aggregate amount arising from the whole estate, graduated as provided by statute, and that the higher rate prescribed by the statute should be first calculated on all the other property of the estate before making any calculation of percentum on the proceeds of the sale of the mortgaged real estate.

Second. That above payments have priority to the payment of the mortgage claim.

Third. That the balance of the fund be applied to the payment of the mortgage claim of Henry Klimper.

A decree may be taken accordingly and a mandate issued to the probate court to carry this decree into execution.

SHOHL and CUSHING, JJ., concur.

**ACTION BY A RECEIVER FOR RECOVERY OF UNPAID STOCK  
SUBSCRIPTIONS NOT APPEALABLE.**

Court of Appeals for Hamilton County.

THE UNION SAVINGS BANK & TRUST COMPANY, RECEIVER, v.  
THE CINCINNATI & COLUMBUS TRACTION COMPANY ET AL.\*

Decided, March 11, 1920.

*Corporations—Recovery of Unpaid Stock Subscriptions—Action for not  
an Action in Chancery and not Appealable.*

1. An action by a receiver of a corporation for the purpose of recovering unpaid stock subscriptions is not a chancery case and is therefore not appealable.
2. Such action is not brought within the jurisdiction of a court of chancery by a prayer which seeks to recover only so much of the unpaid stock subscriptions as is necessary to pay the debts and obligations of the corporation and to equalize such payments among all the stockholders.

*C. B. Matthews* for plaintiff in error.

*Murray Seasongood, Robert P. Goldman, Jacob Shroder and  
John C. Healy* for defendants in error.

KUNKLE, J.

Heard on error.

This is an action brought by the receiver of the Cincinnati & Columbus Traction Company against such company and numerous stockholders therein to recover from such stockholders certain unpaid stock subscriptions.

The petition was framed upon the theory of a bill in equity to recover such portion of the unpaid stock subscription owing by each of said defendant stockholders, as might be necessary to pay the obligations of said the Cincinnati & Columbus Traction Company, and also to equalize the payments made and

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\*Motion to require the Court of Appeals to certify its record in this case overruled by the Supreme Court, June 22, 1920.

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to be made by the various stockholders upon such stock subscriptions.

The First National Bank of Norwood, Ohio, filed a cross petition in which it sought substantially the same relief upon behalf of itself as a creditor and upon behalf of all other creditors.

The case was submitted to the trial court upon various demurrers to the petition of plaintiff and also upon various demurrers to the cross petition of the First National Bank of Norwood.

The trial court rendered the following judgment upon such demurrers, namely:

"The court upon due consideration sustains the demurrers to the petition filed herein and to the cross petition of the First National Bank of Norwood upon the ground that there is a misjoinder of parties defendant and upon the ground that separate causes of action against the several defendants are improperly joined, and the plaintiff and cross-petitioner not desiring to plead further the petition and said cross petition are hereby dismissed as against all defendants demurring and judgment for costs is hereby rendered in favor of each of said defendants for costs herein."

The case comes into this court upon appeal and also upon a proceeding in error from the judgment so rendered by the trial court.

We have carefully considered the authorities cited by counsel in their very exhaustive briefs. We shall not attempt to review or discuss the authorities in detail, but will announce the conclusion at which we have arrived after a consideration of such authorities.

Regardless of what the rule may be in other jurisdictions we are of opinion that it is clearly settled in this state that an action by a receiver of a corporation for the purpose of recovering unpaid stock subscriptions is a proceeding at law and not in equity.

The rule as announced in the syllabus of the case of *Smith, Receiver, v. Johnson*, 57 Ohio State Reports, page 486, is as follows:

"(1) An action to collect an unpaid subscription to the capital stock of a corporation instituted by a receiver appointed under Chapter 5, Division 7 of Title 1, Revised Statutes, to wind up the affairs of the corporation is a suit at law to recover a money judgment.

"(2) It is not proper practice for such a receiver to join in one action all delinquent stockholders as defendants, those who reside out of the county where the suit is brought, as well as those who reside within such county and issue summons to another county to obtain service upon such non-residents."

This case was approved and followed in the 94th Ohio State Reports, at page 138, and has not been disapproved nor criticised by any subsequent decision of our Supreme Court.

We think the attempt upon the part of the plaintiff to create an equitable case by asking for an equalization of payments made by stockholders upon their stock and the collection of only so much of the unpaid stock subscription as may be necessary to liquidate the obligations of the company does not change the nature of the cause of action set forth in either the petition or the cross petition of the bank. The cause of action in both the petition and the cross petition is to collect unpaid stock subscriptions.

We can not escape the conclusion that the action is one at law in which various stockholders were improperly joined, and in which the causes of action against such stockholders were improperly joined.

We think the various demurrers to the petition and to the cross petition of the First National Bank of Norwood were properly sustained upon such grounds and the judgment of the lower court will be affirmed.

The appeal will be dismissed for the reason that the judgment rendered was in an action at law and not in a proceeding in chancery. Case of *C. & C. Traction Co. v. Union Savings Bank & Trust Co.* (9 Ohio Appellate Court Reports, 414; 31 O.C.A., 121), approved and followed.

Judgment affirmed. Appeal dismissed.

ALLREAD and FERNEDING, JJ. ,concur.

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Hamilton County.

**DAMAGES FOR CHANGE OF GRADE.**

Court of Appeals for Hamilton County.

ST. BERNARD V. GOHMAN.

Decided, February 6, 1919.

*Municipal Corporations—Street Improvement and Change of Grade—Effect of Failure of Abutting Owner to File Claim for Damages—May Sue, When—Defenses Available to the Municipality—Whether a Grade is Unreasonable Must be Determined as of the Time of Its Establishment—Misconduct of Counsel—Charge of Court—Measure of Damages.*

1. Section 3830, General Code, relating to filing claims for damages resulting from an improvement by a municipality, does not purport to extinguish the cause of action, but is merely procedural; and was designed to give the city an opportunity to investigate or settle and adjust the claim without cost.
2. In an action for damages resulting from a change of grade in making a street improvement the question of the effect of failure of plaintiff to comply with Section 3830, General Code, must be raised by plea or motion by the city at the outset of the trial, and a failure to make the objection until the court comes to charge the jury constitutes a waiver.
3. Section 3823, General Code, provides a defense to a cause of action for damages resulting from an improvement to the abutting owner upon the giving of a proper notice and upon failure of an owner to present a claim, and such defense may be made by an amended answer, the right to file which is within the court's discretion.
4. The question whether a grade established by a city council is unreasonable must be determined as of the time of its establishment.
5. A charge that the jury may take into consideration on the issue of the unreasonableness of an established grade an unofficial survey of the city engineer made many years prior to the establishment of such grade, and that if the buildings upon the lot were constructed to a reasonable grade at the time of their construction the owner was entitled to damages if the established grade was found unreasonable, is misleading and prejudicial.
6. The measure of damages in cases where the established grade is unreasonable is the difference between the amount of damages

which would have resulted to the property from the establishment of a reasonable and proper grade and that resulting from the grade actually established.

7. Statements of a trial court in a general charge which would reasonably lead the jury to the conclusion that the measure of damages was the difference between the value of the property before the establishment of the grade and the value subsequent thereto are erroneous and misleading.
8. Where the trial court in different portions of the charge states a correct and also an incorrect rule upon the measure of damages and where from the whole charge in connection with the evidence it is uncertain which rule the jury adopted, the verdict and judgment should be set aside.
9. The latitude allowed counsel in the argument of the case is in some measure a matter of discretion with the trial court. A reviewing court should not reverse upon the ground of misconduct of counsel in the argument of the case unless from the whole record it is clear that the trial court abused its discretion to the prejudice of the complaining party.

*John R. Quane, city solicitor, and Wilson, Fitzpatrick & Jones, for plaintiff in error.*

*Otto Pfleger and Renner & Renner, for defendant in error.*

ALLREAD, J. (of the Second Appellate District, sitting in place of JONES, J.).

Heard on error.

Elizabeth Gohman is the owner of four lots or tracts of land fronting upon Greenlee avenue in the city of St. Bernard. Her husband, who was her predecessor in title, improved the lots by the construction of dwelling houses, fronting upon Greenlee avenue. These improvements were made prior to the establishment of a street grade. On February 14, 1913, the city of St. Bernard, through its council, established a grade for Greenlee avenue, extending along the property of Elizabeth Gohman. The effect of the grade and the construction of the street with reference thereto left one lot considerably above the grade and the other three lots upon the other side of the street from one to five feet below. Elizabeth Gohman thereupon brought this action in the insolvency court to recover damages.

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Upon the trial she abandoned her claim for damages as to the lot which lay above the grade and prosecuted the case for the three lots lying below.

The trial resulted in a verdict and judgment for \$2,500, in favor of the plaintiff, and error is prosecuted by the city.

Several grounds are urged for the reversal of the judgment. The court was requested before argument to charge the jury in substance that if a claim for damages was not filed by the plaintiff more than sixty days before the bringing of the action, the verdict should be for the defendant. It is contended that such instruction should have been given under Section 3830, General Code. This section does not purport to extinguish the cause of action, but is merely procedural. It was designed to give the city an opportunity to investigate or settle and adjust the claim without cost. If the city desired to take advantage of this provision, it was bound to make the question by plea or motion at the outset of the trial. *City of Toledo v. Meinert*, 15 C. C., (N. S.), 545. The failure to do so constitutes a waiver. The trial court properly refused such charge.

The defendant below, by an amended answer, invoked the provisions of Section 3823, General Code, which are as follows:

"An owner of a lot, or of land, bounding or abutting upon a proposed improvement, claiming that he will sustain damages by reason of the improvement, within two weeks after the service of the notice or the completion of the publication thereof, shall file a claim in writing with the clerk of council, setting forth the amount of the damages claimed, with a general description of the property with respect to which it is claimed the injury will accrue. *An owner who fails to do so, shall be deemed to have waived such damages and shall be barred from filing a claim or receiving damages.* This provision shall apply to all damages which will obviously result from the improvement, but shall not deprive the owner of his right to recover damages arising, without his fault, from the acts of the corporation, or its agents."

The amended answer asserts that plaintiff, although duly served with notice, failed to file her claim within the time

specified and therefore waived the same. There was a motion to strike the amended answer from the files, but the motion was overruled. Section 3823, General Code, provides for a complete defense to the cause of action, upon the giving of notice and upon failure to present a claim. This defense might be made by an amended answer, and the right to file such amended answer was within the court's discretion. It is settled by decisions of our Supreme Court that Section 3823, General Code, is valid and will be enforced in cases clearly falling within its provisions. *Railroad Co. v. Defiance*, 52 Ohio St., 262, and *Cohen v. Cleaveland*, 43 Ohio St., 190.

There was an issue as to the service and sufficiency of the notice. The burden of proof was upon the city to make out this defense. There was a conflict of evidence upon the question of notice. The clerk testified that he served the notice personally upon the plaintiff, and that he made a record or return at the time. This record was also produced. The plaintiff testified in her own behalf and denied the service.

Counsel for the city called to the court's attention an affidavit on file in connection with the motion to strike the amended answer from the file. It does not appear from the bill of exceptions that such affidavit was before the jury and it can not be considered by the reviewing court as part of the evidence upon which the jury based its verdict.

We have reached the conclusion that while there is some doubt as to the weight of the evidence, the verdict is not so manifestly contrary to the weight of the evidence as to justify a reversal upon that ground. The form of the notice and the ordinance for the improvement conform substantially to the requirements of the statute, and it was not necessary to serve more than one notice upon the plaintiff in the case at bar.

The trial court refused to give charge No. 4 before argument. This charge was based upon the provisions of Section 3823, but we think it did not clearly emphasize the controverted question of fact, to-wit, the service of notice upon the plaintiff below. The jury might have been led by the giving of that charge to overlook the importance of the preliminary finding as to

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whether the notice had been served. We find no error in the refusal to give charge No. 4. The law upon this subject was clearly and correctly stated in the general charge.

This brings us to the question of the alleged unreasonableness of the grade of February 14, 1913.

In the case of *The City of Akron v. the Chamberlain Co.*, 34 Ohio St., 328, it is held:

"The owner of a lot abutting on an unimproved street of a city or village, in erecting buildings thereon, assumes the risk of all damage which may result from the subsequent grading and improvement of the street by the municipal authorities, if made within the reasonable exercise of their power.

"Whether a grade be unreasonable or not, must be determined by the circumstances existing at the time the grade was established, and not by the circumstances existing at the time abutting lots may have been improved."

This case has been approved in the case of *The City of Akron v. Huber*, 78 Ohio St., 372.

Considerable evidence is found in the record tending to prove an unconfirmed survey in 1893 or 1894 of a proposed grade of the street in controversy by Daniel S. Hosbrook, the village engineer, and of an opinion by him that such grade was a reasonable one; also that the then owner of the property relied thereon in the improving of his property. In the general charge the trial court says:

"In this connection you can take into consideration the testimony of the plaintiff in this case, tending to show at the time they consulted the city engineer, Mr. Hosbrook, as to the grade, and what he said to them. You can take that into consideration when you come to determine the question of what is a reasonable grade. If the buildings were put up at that time to a reasonable grade, then the plaintiff would be entitled unquestionably to damages, provided, of course, you find that this which was subsequently established some twenty-one years afterwards was an unreasonable grade under all circumstances."

This charge is misleading in that it emphasizes too strongly the significance of the survey and opinion of the village engineer

in 1893, and would call for some definite charge by the trial court to the effect that the reasonableness or unreasonableness of the grade established in 1913 was to be determined as of the time when the grade was actually made.

As to the measure of damages, we think the rule is stated in *Hurst v. City of Akron*, 23 C. C., (N. S.), 591:

"The measure of his damages in such case will be the difference between damages which would have resulted to his property from the establishment of a reasonable and proper grade and that resulting from the grade as actually established."

While there is one sentence, or perhaps two, in the general charge of the court, which correctly states the measure of damages, yet there are other statements of a misleading and, we think, prejudicial character. Among the statements we quote the following:

"The real question being what was the value of the property before the grade was established, and before the improvement was made, and what was the value of the property afterwards."

Also the following:

"So if you find the owner's grade, that is to say, the grade they built the house on, and that grade was reasonable, and the grade established by the city of St. Bernard was unreasonable, then you must allow such damages as will accrue on account of the difference of the property."

Also:

"If you find this grade unreasonable, the amount you award to the property owner, the plaintiff in this case, is to be such an amount that when she leaves this court room she is no richer or poorer than when she came into this court room, so that she can still say: my property has been injured, but I have received such an amount at the hands of the jury, I am as well off now as before."

These statements do not actually state the measure of damages in the case at bar, and would have a prejudicial effect upon the jury in estimating damages.

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The correct rule in other parts of the charge is not so prominently or clearly stated as the opposite rule in the charges above quoted. It is well settled in this state that where both a correct and an incorrect rule are given to the jury, and where from the whole charge it is uncertain which rule the jury adopted, the verdict and judgment should be reversed. *The Pendleton Street Rd. Co. v. Stallman, Administratrix*, 22 Ohio St., 1; *The Aetna Ins. Co. v. Reed*, 33 Ohio St., 283, and *The Little Miami Rd. Co. v. Wetmore*, 19 Ohio St., 110.

The court in its general charge correctly stated the issues and then proceeded to discuss each branch.

On page 511 the court says:

"The pivotal question, the point in this case, the amount of damages, revolves around the question of the reasonableness of the grade."

The court most likely intended this statement to be confined to the branch of the case involving damages, but nevertheless it was capable of being differently construed by the jury.

There are also some sentences in the charge in reference to lateral support, etc., which, after the withdrawal of the claim for damages as to the fourth tract, were not relevant to the case as presented.

The evidence as to the construction of a retaining wall or a fill was incidental. Such facts might be brought out as elements to be considered under certain circumstances, but they do not form the measure of damages.

The alleged misconduct of counsel in the closing argument is urged as ground for reversal.

We have considered that the closing argument of counsel for plaintiff below is a part of the record.

In the case of *The Ohio & Western Pennsylvania Dock Co. v. Trapnell*, 88 Ohio St., 516, it is held that the control of counsel during the trial of the case is in some measure a matter of discretion of the trial court. The reasoning is especially applicable in the case at bar. We do not have before us the argument of all the counsel. The scope of a closing argument

depends somewhat upon those which precede. The trial court was, therefore, in a better position to determine whether any of this argument was provoked or justified by anything said by opposite counsel. The case of *Driscoll v. the Cincinnati Traction Co.*, 88 Ohio St., 150, eliminates as ground for reversal improper remarks of counsel upon general subjects. We think that the statements referred to in the closing argument of counsel do not of themselves constitute ground for reversal.

We have gone into the question argued somewhat fully to aid counsel and the court in retrial of the case.

For errors in the charge, above referred to, the judgment of the insolvency court is reversed, and the cause remanded for a new trial.

HAMILTON and SHOHL, JJ., concur.

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**PROPRIETOR OF HOTELS NOT SERVING MEALS LIABLE  
AS INNKEEPER.**

Court of Appeals for Cuyahoga County.

KANELLES V. LOCKE.

Decided, November 28, 1919.

*Innkeeper—Proprietor Liable for Loss of Valuables—Deposited with One Pretending to Act as Clerk—Application of the Doctrine of Agency by Estoppel—Status Before the Law of Hotel Proprietor not Furnishing Meals.*

A guest arrived at a hotel in the nighttime, was assigned to a room and deposited his money and valuables with a person who was apparently in charge as clerk or cashier, who issued a receipt to the guest but later absconded with his property. In an action by the guest to recover the value of the stolen property, the proprietor of the hotel denied the agency of the person who received the property and issued the receipt. *Held:*

1. The proprietor is liable under the doctrine of agency by estoppel, which is based upon the principle that where one designedly or negligently permits another to act as an apparent agent, any loss,

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- as between two innocent parties, will fall upon the one whose conduct brought about the situation.
2. The fact that the hotel did not furnish food or meals, but was conducted solely for lodging purposes, does not relieve its proprietor of the legal status of an innkeeper.

*Siegel & Siegel*, for plaintiff in error.

*T. J. Ross*, for defendant in error.

VICKERY, J.

Heard on error.

This cause comes into this court on petition in error from the municipal court of the city of Cleveland, the relation of the parties being the same as in the court below, where D. Kanelles brought an action to recover the sum of \$744, being the amount of money and valuables that he deposited with a man in charge of the Hotel Ohio, owned and operated by Mrs. Ida J. Locke, the defendant, in which action he failed.

It seems that Mrs. Locke was running the Hotel Ohio, in 1627 Prospect avenue, Cleveland; that on December 23, 1918, at the hour of one o'clock in the morning, Mr. Kanelles applied, with a friend, and was received as a guest in said hotel, and paid the \$2 for a room, to which they were assigned; that in the hotel were notices posted as is required of innkeepers under the law of Ohio; that after they were shown to a room Kanelles told the man who appeared to be in charge, and who showed them to the room, that he desired to leave his money and valuables with the hotel proprietor for the night, whereupon they all returned to the office and the man in charge wrote out a receipt describing \$484 in currency, a diamond stickpin and two checks for \$5 each; that the man signed this receipt with the name of the proprietress of the hotel, Mrs. Locke, by him, and gave it to Kanelles, after which he, Kanelles, retired; that in the morning he presented the receipt to Mrs. Locke, and requested the return of his money and valuables, whereupon he learned that this man who apparently was in charge of the office was not in the employ of Mrs. Locke at all, and, as she claimed, had no authority to receive the money or valuables; that upon going to the room

of this man Mrs. Locke found that he had absconded, taking the money and valuables with him; and that Mrs. Locke refused to make good the loss to her guest and the action was brought, resulting in a verdict for the defendant.

We have gone over this bill of exceptions carefully, and it shows that this man who signed the receipt, J. C. Clemons, was and had been for some time a roomer in this hotel. We further find that the hotel was open to receive visitors at this time in the morning, or night, and that no one was in the office to take charge of guests who might arrive except this persons Clemens and a young lady who was also a boarded or lodger in the hotel; that when the plaintiff entered with his friend and asked for a room, Clemens, who appeared to be in charge, got up and went behind the counter, had them register, got the key from its proper place, assigned them to a room, and took them to their room; and that after they had gone to the room, when the plaintiff requested that the hotel take charge of his valuables, they went down to the office, and with the help of the young lady wrote a receipt which at first was not satisfactory, and then wrote the receipt of which the following is a copy:

"Mr. D. Kanalos, Man in Room 111 Gave me 1 Diamond pin and \$484.00 in bills and 2 \$5.00 checks.

"Mrs. Locke  
"Hotel Ohio  
"per J. C. Clemens."

During this time the only person who appeared in charge of the office was this man Clemens. Whether Mrs. Locke had turned over the office to him to do these things we are not able to determine; but the fact remains that he was the only person there, apparently in charge of a public office that was receiving guests at that time in the morning or night, and that plaintiff became a guest and had a right to turn his valuables over to the hotel for safe-keeping, in accordance with the notices published in the hotel. We think the plaintiff was warranted in believing that this man in charge was the duly authorized agent for the purpose of receiving guests and receiving for safe-keeping valuables of the guests.

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It is claimed by the defendant that this man was not her agent and had no authority to receive valuables or do anything around the hotel, and that therefore she was not responsible for any money or valuables that might be deposited with him. We can not acquiesce in this doctrine. An agency may be created by estoppel, and that estoppel may be allowed on the ground of negligence or fault on the part of the principal, *upon the principle that when one of two innocent parties must suffer loss. The loss will fall on him whose conduct brought about the situation.* 2 Corpus Juris, 462, and cases cited.

Here the proprietress of this hotel left this man in the office either designedly or negligently, clothed with apparent authority to do what hotel clerks usually do, and one who came in for the purpose of becoming a guest, and did become a guest, might reasonably conclude that he had *apparent authority* to do what clerks under similar circumstances would have a right to do.

In *Curtis v. Murphy*, 63 Wis. 4, we find this doctrine:

"A traveler who goes to a hotel at night and finds a clerk in charge of the office, assigning rooms, etc., has the right to assume that such clerk represents the proprietor and has authority to take charge of money which may be handed him for safekeeping."

And in that case the Supreme Court of Wisconsin held the hotel keeper responsible under circumstances similar to those in the case at bar.

In 14 Ruling Cas Law, 531, we find this doctrine:

"A delivery of goods to one not authorized to receive them is not a delivery to the innkeeper, but a person need not be expressly authorized to receive the property. A guest is justified in assuming that a clerk in charge of the office of the inn represents the proprietor and has authority to take charge of money which may be handed to him for safekeeping, and a deposit with an employee of the innkeeper, who by his conduct and position in the hotel, leads one to infer that he represents the innkeeper for the purpose of receiving property for safekeeping, is deemed a deposit with the innkeeper for which he is responsible as such."

Above authority cites may cases, among which is *Houser v. Tully*, 62 Pa. St., 92, where we find the doctrine laid down that

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an innkeeper is bound to pay for goods stolen in his house from a guest unless stolen by the servant or companion of the guest. And in the same case: "In case of a loss at an inn, the innkeeper is liable, although sick or absent."

Again, in the same case:

"An innkeeper is not liable for the loss or embezzlement of his guest's money when he does not deposit it on the security of the inn, but intrusts it to another guest or inmate in whom he reposes his confidence."

These authorities, and others, show that where an innkeeper has permitted one to occupy a position which would tend to mislead the public, he can not divest himself of the liability; for the agency of the person presuming to act under such circumstances is created by estoppel, and cases of estoppel are limited to those in which there is no *real*, but only *apparent* agency, and here was an apparent agency. Accordingly we think the principle alluded to above, namely, that where one of two innocent persons must suffer loss, the loss will fall on him whose conduct brought about the situation, is applicable here. In the case, *Pittinger v. Alpena Cedar Co.*, 141 N. W. Rep., 535, this doctrine is again established and elaborated upon.

But it is said that the defendant in this action was not an innkeeper within the meaning of the law of innkeepers, because, forsooth, the Ohio Hotel does not furnish food as well as lodging. We can not accede to this doctrine, for, if it were established, no hotel run under the European plan would come under the law of innkeepers, nor would it be liable for loss of goods delivered to a person apparently representing the hotel. It is true that early in the history of law an innkeeper furnished all sorts of entertainment, including liquid entertainment, and food especially; but the modern custom of conducting hotels would necessarily create a departure from the rigid doctrine of the early law cases.

In the case at bar Mrs. Locke, the defendant, had complied with all the requirements of the statute to relieve innkeepers from liability by posting the notices required by law, and we think that she was an innkeeper within the meaning of the law;

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we think that she by her voluntary act or by her negligent act, had placed someone in a position where it would appear to anyone coming in to become a guest at the hotel that he was properly in charge, and that therefore she made herself by her conduct responsible for his acts, acting within the apparent scope of a clerk or employee in a hotel, to receive property of her guests; and we think the court was clearly wrong in holding that there was no responsibility and in rendering a judgment against the plaintiff for costs. For these reasons the case will be reversed and remanded to the municipal court for further proceedings in accordance with law.

DUNLAP and WASHBURN, J.J., concur.

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#### DEFINITION OF "SPECIFIC GOODS" UNDER THE SALES ACT.

Court of Appeals for Hamilton County.

Judge Richards of the Sixth District sitting in the place of Judge Hamilton.

W. N. CLARK CO. v. BANNER PACKING CO.

Decided, December 15, 1919.

*Contracts—Condition Subsequent—How Pleaded—“Specific Goods” are Goods Already Made, and not Goods to be Manufactured to Specifications—Buyer Need not Allege Readiness to Pay for Goods not Delivered, When.*

1. A condition stipulated in a contract, on the happening or performance of which the contract already in effect may be defeated, constitutes a condition subsequent. In an action on a contract containing such a condition, the plaintiff need not allege that such condition has not happened. If the defendant relies upon it as a defense, he must allege and prove that it did happen.
2. Under the sales act, “specific goods” are existing goods agreed upon and identified at the time the contact to sell or a sale is made. The fact that goods to be made in the future must accord with specification does not make them “specific goods.”

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3. Where a buyer is not required under the terms of the contract to pay until ten days after delivery, he is not obliged to prove that he was ready and willing to pay for goods that were never delivered.

*Milton Clark and P. H. Rue*, for plaintiff in error.

*Howard W. Ivins and Eltzroth & Maple*, for defendant in error.

SHOHL, P. J.

Heard on error.

In December, 1915, plaintiff in error, which was also the plaintiff below, entered into a contract on the printed form furnished by defendant, whereby it agreed to purchase, and the Banner Packing Company agreed to deliver, 5,000 cases of canned corn at 60 cents per dozen, f. o. b. factory. Shipment was to be made as soon as packed and ready for delivery, terms  $1\frac{1}{2}$  per cent. off cash in ten days. "In case of the destruction of the canning factory, seller is not liable for non-delivery."

In 1916, when part of the corn had been shipped, the contract was modified by the parties by an agreement that the 2,000 cases then remaining undelivered should be furnished out of the pack of the following year, at the 1916 price.

In April, 1918, plaintiff brought suit alleging merely a contract for the delivery of the corn, and that defendant had packed sufficient corn to make delivery, and could have delivered it, but that defendant failed and refused to deliver any of the 2,000 cases, though plaintiff made demand and was ready and willing to pay. Plaintiff prayed for damages for breach of contract.

Defendant in its answer set up that the agreement contained a condition that in case of the destruction of the canning factory, defendant would not be liable for non-delivery. It further alleged that it completed its 1917 pack on October 11, 1917; that on October 14, 1917, a part of its factory, in which its pack for that year was stored, was totally destroyed by fire, thus rendering the corn unfit for market and making it impossible to deliver the corn to plaintiff. In its reply plaintiff admitted the contract as averred by defendant, and denied "that the canning factory, or any part thereof, was destroyed by fire on the 14th day of October, 1917, or at any other time."

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A jury trial was had. There was some incidental reference to a fire in the testimony of officers of the defendant, given as if under cross-examination, pursuant to Sec. 11497, General Code. It may be noted that plaintiffs were not concluded by the testimony so given; but the evidence fell short of establishing the destruction of the canning factory. At the conclusion of plaintiff's testimony the court instructed the jury to render a verdict in favor of the defendant, for the reason that the contract was conditional and plaintiff had failed to offer evidence tending to prove that there had not been a destruction of the canning factory.

The contract required the defendant to furnish the corn, f. o. b. factory, in 1917. The provision as to the destruction of the factory stipulated a contingency on the happening of which defendant should be discharged from liability. Such a condition is a condition subsequent, by the happening or performance of which a contract, already in effect, may be defeated. *Title Guarantee & Surety Co. v. Nichols*, 224 U. S., 346, 351. In an action on a contract which refers on its face to such a contingency, the plaintiff need not allege that such a contingency has not happened, but if the defendant relies upon it as a defense he must allege and prove that it did happen. 9 Cyc. 727; 13 Corpus Juris., 718; *Smokeless Fuel Co. v. Seaton & Sons*, 105 Va., 170 (52 S. E., 829); *Wooters v. International & G. M. Rd. Co.*, 54 Tex., 294; *Root v. Childs*, 68 Minn., 142 (70 N. W. 1087); *Hudson v. Archer*, 4 S. D., 128, 136; *Moody v. Ins. Co.*, 52 Ohio St., 12. See also *Mumau v. Western & Southern Life Ins. Co.*, 97 Ohio St., 1.

The court therefore erred in holding that the burden of proof in respect to the destruction of the canning factory was on the plaintiff. To prevent recovery on that ground the burden is on the defendant to show that there was a "destruction on the canning factory."

The case of *Leisy & Co. v. Zuellig*, (7 C. C., 423; 6 Circ. Dec. 175), cited to support the view of defendant, was one where there was an issue as to the existence of the contract claimed by plaintiff. In the case at bar the contract stands admitted in the pleadings and there remained only the question of performance and excuse for non-performance of it.

It is contended, however, that the judgment of the court was correct, even if the reason assigned by it was erroneous. It is urged that the contract was one to sell specific goods, and that under paragraph 1 of Sec. 8388 G. C., the contract is avoided if the goods wholly perish. It might be sufficient to point out that the evidence did not establish that the goods wholly perished. The argument, however, is based upon an incorrect interpretation of the phrase "specific goods." Specific goods are existing goods, agreed upon and identified at the time a contract to sell or a sale is made. Section 8456 G. C., paragraph 1. The fact that goods are to be made in the future in accordance with specifications does not render them specific goods. They are "future goods."

Defendant urges that plaintiff failed to prove that it was ready and willing to pay defendant as alleged. This must be considered in view of the sequence of performance fixed by the parties in their contract. Plaintiff was to receive the goods f. o. b. defendant's factory, and was not required to pay till ten days thereafter. He was not obliged to be ready to pay until after defendant had made the shipment. Williston, Sales, Sec. 448.

The argument, therefore, that the judgment may be sustained for reasons different from those given by the trial court can not be sustained. The judgment will be reversed and the cause remanded for a new trial.

CUSHING and RICHARDS, JJ., concur.

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## REGULATION OF THE SALE OF NARCOTICS.

Court of Appeals for Hamilton County.

RAPHAEL W. MILLER v. STATE OF OHIO.

Decided, March 17, 1920.

*Constitutional Law—Validity of Statute Regulating Sale of Cocaine—Use of Narcotics by a Physician in his Practice—What Constitutes “Proper Practice” in such Cases is a Question for the Jury.*

1. Section 12672, General Code, regulating the sale and furnishing of narcotics is constitutional and valid.
2. The following provision of said section, viz.: "When prescribing for their patients for actual and necessary purposes and in the proper practice of their respective professions" is not void for uncertainty. The question as to what constitutes "proper practice" should be submitted to the jury as a question of fact and should be determined from all the facts and circumstances surrounding the case and from the expert and other evidence submitted.

*Cohen, Mack & Hurtig* for plaintiff in error.

*George T. Poor*, for defendant in error.

**KUNKLE, J.**

Heard on error.

Plaintiff in error, a physician, was jointly indicted with one Ashur Miller, a druggist. They were charged

"With unlawfully and knowingly selling and furnishing unto one Stella Rogers on September 13th, 1916, a quantity of morphine, to-wit 7½ grains thereof, said sale and furnishing of morphine aforesaid not then and there being upon an original or written prescription of a physician, dentist or veterinary surgeon duly licensed under the laws of Ohio, issued in prescribing for said Stella Rogers for actual and necessary purposes in the proper practice of their respective professions," etc.

Plaintiff in error was convicted in the municipal court of Cincinnati as he stood charged in the affidavit.

Ashur Miller was acquitted by the jury. Plaintiff in error was sentenced to pay a fine of \$500 and to serve three months in the county jail.

Error was prosecuted from the judgment of the municipal court to the court of common pleas. The judgment of the municipal court was affirmed by the court of common pleas.

Error is prosecuted to this court from the judgment of the court of common pleas affirming the judgment of the municipal court.

Various errors are assigned in the petition in error and also in the brief of counsel for plaintiff in error.

The affidavit above referred to was based upon Section 12672, General Code, which provides that:

"Section 12672. Whoever sells, barters, furnishes or gives away, directly or indirectly, \* \* \* any quantity of morphine except upon the original written prescription of a physician, dentist or veterinary surgeon, duly licensed under the laws of this state, when prescribing for their patients for actual and necessary purposes in the proper practice of their respective professions \* \* \* shall be fined not less than twenty-five dollars, nor more than five hundred dollars, or imprisoned in the county jail not less than thirty days nor more than six months, or both at the discretion of the court."

The sufficiency of the affidavit in the case at bar has been challenged by motion and demurrer upon the ground that the statute upon which the prosecution is based is indefinite, uncertain and unconstitutional.

It is conceded that the affidavit contains the essential features of the statute governing such cases but it is claimed that the statute is void for the reasons above suggested.

The principal objection to the statute relates to the following clause thereof, namely:

"When prescribing for their patients for actual and necessary purposes in the proper practice of their respective professions."

It is urged with considerable force that this clause is too indefinite and uncertain to support a criminal charge.

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The constitutionality of the Federal act known as the Harrison anti-narcotic act has been upheld by the Supreme Court of the United States in the case of *United States v. Doremus*, 249 U. S. Reports, page 86.

The case of *Webb & Goldman v. United States*, 249 U. S. Reports, page 96, was also decided by the Supreme Court of the United States, upon the same day that the Doremus case was decided, and involved a construction of the Federal act known as the Harrison anti-narcotic act. The Harrison anti-narcotic act was also upheld by the United States Supreme Court in this case.

Section 12672, General Code, is framed upon the same general lines as the Harrison anti-narcotic act but is somewhat broader in certain respects.

We think the principal feature of the Ohio act which was not involved in the Federal act above referred to is the clause in relation to the "proper practice of their respective professions."

We have carefully considered the authorities cited by counsel in their exhaustive briefs upon the constitutionality of Section 12672, General Code, and without undertaking to discuss these authorities in detail will state that our examination thereof has led us to the conclusion that the provisions of Section 12672, General Code, in so far as the same are involved in the present prosecution, are constitutional.

The latest expression of our Supreme Court upon the constitutionality of a statute somewhat similar to the one involved in this case is found in the case of *State of Ohio v. Schaeffer*, 86 O. S., 215. The Schaeffer case involved the construction of Section 12603, General Code, relating to the operation of automobiles. This section makes it an offense to operate an automobile,

"at a speed greater than is reasonable or proper, having regard for extent, traffic, use and the general and usual rules of such road or highway, or so as to endanger the property, life or limb of any person."

It was claimed in the Schaeffer case that the words "reasonable" and "proper" were so general, comprehensive and variable that it would be impossible for a person to know, or for the jury

to fairly determine what did and what did not constitute a violation of the statute; that one jury might hold a speed to be reasonable while the same speed under similar circumstances might be held by another jury to be unreasonable. In the case at bar it is also urged with considerable force that one might find it "proper practice" to treat a person addicted to the use of morphine by the reduction method of treatment, whereas another jury might find the proper practice would consist of the withdrawal of all morphine from the patient. The Supreme Court held in the Schaeffer case that Section 12603, General Code, was as definite and certain on the subject-matter and the numerous situations arising thereunder as the nature of the case and the safety of the public would reasonably admit.

Applying the reasoning in the Schaeffer case to the case at bar, we are inclined to think that Section 12672 General Code, is constitutional and that the provision referred to is not so uncertain or indefinite that a criminal prosecution can not be based thereon.

Various rulings made during the progress of the trial are also complained of.

The principal objections urged by counsel for plaintiff in error and which were made during the trial of the case relate to the introduction of evidence; the charge of the trial court and the refusal of the trial court to give certain special instructions requested by counsel for plaintiff in error.

We have carefully considered the special charges requested by counsel for plaintiff in error and which were refused by the trial court.

Several of the special charges which were given by the trial court, at the request of plaintiff in error, substantially covered the important features of the case.

Among the special charges requested and refused was No. 11. We think this charge was properly refused as it made the judgment of plaintiff in error final. The giving of this charge would in effect repeal the statute.

Special request No. 12 we think was also properly refused. This charge states that the defendants must be acquitted unless the method employed for the treatment of Stella Rogers was not

a recognized method of treatment. Under this charge if the treatment prescribed was considered by this particular doctor, his druggist and the patient as a recognized method of treating such cases, but was not so considered by any other person, then it might be considered as a recognized method of treatment and the purposes of the statute annulled. Special charge No. 17 we think was properly refused. It was too broad and would in effect repeal the statute. If the administration of morphine by any physician is permissible, provided such physician says he considers such treatment effective, then the statute is of little, if any, benefit.

We think the trial court also properly refused special charge No. 18. This special charge is too broad, and if given would have excluded the consideration by the jury of sales made to Stella Rogers before and after the 13th day of December, 1916.

We think such sales made to Stella Rogers before and after September 13th, 1916, were competent to be considered by the jury as reflecting upon the issue as to whether the plaintiff in error was engaged in the "proper practice" of his profession in issuing the prescription of September 13th.

The trial court among other special charges gave Nos. 7, 13 and 15. These special charges are as follows:

"7. If the jury should find that Stella Rogers was an addict of morphine, and sought the services and assistance of the defendant, R. W. Miller, for the cure of that habit, and if it should appear that the prescription relied upon for conviction was given for the actual and necessary purposes in the treatment of the said Stella Rogers, the jury must return a verdict of not guilty as to both defendants."

"13. If the defendant, R. W. Miller, in good faith adopted the method of treatment of Stella Rogers known as the reduction method, and the prescription referred to in the affidavit was written by him in good faith, for actual and necessary purposes of such treatment of Stella Rogers, you must acquit both defendants of the charge."

"15. Unless the state proves beyond a reasonable doubt that the prescription alleged to have been written on September 11, 1916, was not for the actual and necessary purposes of the treatment of Stella Rogers (also known as Stella Wilson), both the defendants must be acquitted. In determining whether or

not the said prescription was given for such actual and necessary purposes of said Stella Rogers, the jury must take into account her condition on said date, and the necessities of her case, as it existed at that time."

The trial court in its general charge to the jury on pages 393, 395, etc., also instructed the jury to the same effect.

We are of opinion that the special charges given at the request of counsel for plaintiff in error not only contained a correct construction of the statute in question, but also presented to the jury the most favorable view to which the plaintiff in error was entitled.

The state introduced evidence showing the entire treatment prescribed by plaintiff in error for Stella Rogers. In brief the treatment commenced on or about July 18th, 1916, and continued until on or about October 19th, 1916. The treatment began by prescribing ten grains of morphine daily and was gradually reduced to six and a quarter grains per day. In September the amount was increased to seven and a half grains because of the physical condition of the patient and then gradually reduced to less than five grains on or about October 5th.

The principal issue before the jury was whether the treatment so prescribed by plaintiff in error and as shown in detail by the record was for "actual and necessary purposes in the proper practice of his profession."

The state offered the testimony of certain medical witnesses to the effect that the proper practice in the medical profession in the treatment of cases of this kind would consist of abrupt withdrawal of all morphine and the confinement of the patient and that any treatment of the patient without confinement would in the opinion of such witnesses be impractical and improper.

The witnesses for the defendant testified that the gradual reduction method is recognized especially in cases where the patient is not under confinement.

The question as to whether plaintiff in error in this particular case under all the circumstances pursued the "proper

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practice," that is the practice as prescribed by the statute, was submitted to the jury as a question of fact.

For the purpose of determining this question of fact the jury was entitled to consider not only the treatment as actually prescribed by plaintiff in error, but also all the circumstances surrounding the case and the expert testimony which was offered.

From a consideration of the entire evidence we are of opinion that there is evidence which would warrant the jury in returning the verdict which it did and the state of the evidence is such that a reviewing court would not be justified in disturbing the verdict upon the weight of the evidence.

The rule governing reviewing courts even in criminal cases is well stated in the case of *Breese v. State of Ohio*, 12 Ohio State Reports, page 146, the fourth paragraph of the syllabus of which is as follows:

"A judgment will not be reversed because the verdict is contrary to the evidence, unless it is manifestly so, and a reviewing court will always hesitate to do so where the doubts of its propriety arise out of a conflict in oral testimony."

We have considered all of the errors complained of by counsel for plaintiff in error, but finding no error in the record which we consider prejudicial to plaintiff in error the judgment of the lower court will be affirmed.

ALLREAD and FERNEDING, JJ., concur.

**RENEWAL OR EXCHANGE OF CORPORATE NOTES NOT AN  
EXTINGUISHMENT OF THE ORIGINAL  
OBLIGATION.**

Court of Appeals for Hamilton County.

KUERZE V. THE WESTERN GERMAN BANK ET AL.\*

Decided, February 8, 1919.

*Corporations—Enforcement of Stockholders' Double Liability—Right of Action for does not Accrue on Appointment of a Receiver—Original Obligation not Extinguished by the Giving of a New Note—Transfer of Assets from Executrix to Legatee not Accomplished Without Some Affirmative Act, Although They are One and the Same Person.*

1. A right of action of creditors against stockholders of a corporation to enforce their statutory liability does not accrue upon the appointment of a receiver, but commences only when the corporate property is put in liquidation for the benefit of creditors, and a suit to enforce stockholders' liability instituted within eighteen months thereafter is not barred by Section 3688 G. C.
2. A corporation incurred obligations evidenced by promissory notes at a time when double liability was imposed upon stockholders. Subsequent to the change from double liability some of the outstanding notes remained unpaid in their original form, some of which were reewed by exchanging them for new notes, others were replaced by new notes because the old notes were completely covered by endorsements, while others were taken up at maturity and new notes issued by going through the form of making a new loan and paying off the old note. In such case the presumption is that the new notes are taken as conditional and not absolute payment of the original obligation, unless a different intention of the parties is shown; but where a referee finds the intention of the parties was that the obligation should continue to exist, double liability may be enforced in respect to all of the notes.
3. A widow, who, as executrix and residuary legatee under her husband's will, elects to take under the will, causes a part of the shares of stock standing in the name of her husband to be transferred to her own name and accepts a real estate dividend from the corporation in her own name, does not thereby constitute herself the equitable owner of all the stock of her former husband. There

\* Affirmed by the Supreme Court, December 22, 1919.

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must be some affirmative act to transfer assets from the executrix to the legatee although they are one and the same person.

*Anthony B. Dunlap*, for plaintiff in error.

*J. W. Peck*, for defendants in error.

**SHOHL, J.**

Heard on error.

The original action herein was brought by the Western German Bank to assess the stockholders of the Gerke Brewing Company, an Ohio corporation, which went into the hands of a receiver June 20, 1911. There was a reference to R. A. Le-Blond, as referee, who filed his report and findings in favor of the plaintiff. This was confirmed and judgment was rendered for \$120,931.64 by the court of common pleas.

The Gerke Brewing Company borrowed various sums of money from the bank in the years 1894 to 1896, inclusive. The notes were not all in the same form, some being discounted and the interest taken out in advance, while some bore interest in accordance with their terms. The notes were renewed from time to time, one of them having been renewed fifty-seven times.

There was also a series of notes made by the brewing company which were made payable to George Gerke, a former stockholder, who had sold out his interest in the brewery to Robert M. Kuerze, his brother-in-law, who was the president of the brewery. The brewing company owed money to Kuerze, who, in turn, owed \$60,000 to Gerke. He directed the making of the notes payable to Gerke direct, and the bank thereafter acquired the rights of Gerke in the notes.

There is nothing shown that would impugn the validity of the notes, which the evidence shows were originally given long before the year 1903.

The interest had been paid on all the notes until 1911, when the company went into the hands of a receiver.

At the time of the receivership the brewing company was solvent, and the appraisement made at the time under the direction of the court showed that the assets exceeded the liabilities by over \$200,000.

On October 29, 1912, the assets of the corporation were put in liquidation for the benefit of the creditors. The sale of the assets was completed in October, 1913, and, after the payment of certain preferred obligations, the assets proved sufficient to pay only a dividend of 10 per cent. to the creditors. The action to enforce the double liability followed. The change in the Ohio Constitution which did away with double liability of stockholders went into effect in November, 1903.

Several points are urged by plaintiffs in error.

The first contention argued is that the statute of limitations barred plaintiff's right; that if the right of action accrued at the time of the receivership, the double liability suit was brought too late. The law of Ohio, however, is that a right of action does not accrue against the stockholders of a corporation simply because a receiver has been appointed. The creditors' right of action against the stockholders only commences when the property is put in liquidation for the benefit of the creditors. *Younglove v. Lime Co.*, 49 Ohio St., 663, and *Bronson v. Schneider*, 49 Ohio St., 438. This suit was brought within eighteen months of that time and was not too late under the statute, Sec. 8688, G. C.

The question was raised as to the sufficiency of the proof to establish that the primary liability of the corporation had been exhausted. The record shows, however, that the stock in the corporation had been issued and outstanding, as paid up, since 1881. In any event, the stockholders owed a duty to pay for their stock at that time, and claims against them on their original subscriptions had become barred by the statute of limitations, fifteen years from the time fixed in the call for payment shown by the books in evidence to be December, 1881. *Warner v. Callender et al.*, 20 Ohio St., 190.

It is clear that no double liability could be imposed upon stockholders for any contract made subsequent to the change in the law in November, 1903.

It is equally plain that as to any obligations existing prior to the change in the law, the stockholders' liability remains

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unimpaired. *Emerich v. People's Coal Co.*, 21 C. C. (N. S.), 83, and *Scofield v. Excelsior Oil Co.*, 6 C. C. (N. S.), 169, affirmed, 74 Ohio St., 513.

If, then, the obligations existing against the company when the double liability suit was brought are obligations which existed prior to November, 1903, double liability can be enforced.

The evidence in respect to the renewals shows that a slightly different course was followed in different instances. Certain notes dated prior to the amendment of the constitution are still outstanding and unpaid in their original form. Certain notes were owned simply by annually exchanging them for new notes. Among these is a note for \$20,000 in favor of the bank, which the referee found was replaced by a new note given because the reverse side of the old note during the ten years that it had been outstanding had become completely covered with endorsements of interest marked thereon. The Gerke notes aggregating \$60,000 were renewed by simply exchanging the maturing notes for new notes of like amount from time to time. As to the two notes for \$5,000 each, the referee found that they were the last renewals of a long chain of notes, one of which was originally for \$10,000. The renewals in these instances were accomplished as follows: The Gerke Brewing Company would be notified of the maturity of one of its obligations, and would present to the bank a new note of like tenor and amount except as to date and maturity. The bank went through the form of making a new loan, and the avails were then used by the check of the brewing company to pay the old note, which was returned to the maker.

In several instances it appears that the brewing company had sufficient funds in the hands of the bank subsequent to November, 1903, to meet the checks drawn by them in payment of the notes due on those dates, without requiring the use of the avails of the discounts of that day. This is true of the \$5,000 note, and also the other \$5,000 note which represented an unpaid balance on an original \$10,000 note. The reduction in the amount of the latter was made in 1905, when the brewing company had \$13,000 to its credit in the bank irrespective of the new discount.

It is contended on behalf of plaintiffs in error that each renewal constituted the making of a new contract, and the payment of the then outstanding note. If such contention is established, it follows that such notes now sued upon are new contracts made subsequent to the abolition of double liability and can not be the basis of a recovery on such double liability. This question was fully argued. The decisions throughout the various states are not uniform as to this question. See Cook on Corporations (7 ed.) Sec. 225A. The subject has been so fully treated in the Ohio cases that we regard the decisions of the other states as not controlling.

The decision in the case of *First Nat. Bank of Wellston v. Patton Co.*, 13 C. C. (N. S.), 289, growing out of the claims for double liability against the stockholders of The Patton Company, was affirmed by the Supreme Court in *Wright v. First Nat. Bank of Wellston*, 87 Ohio St., 497, and is binding upon this court. We have examined the record and the original briefs of that case in the Supreme Court, and, among others, have also examined the following cases: *Chase v. Brundage*, 58 Ohio St., 517; *First Nat. Bank of Athens v. Green*, 40 Ohio St., 431; *First Nat. Bank of Athens v. Slemmons*, 34 Ohio St., 142; *Kawson v. Taylor*, 30 Ohio St., 389; *Sutliff v. Atwood*, 15 Ohio St., 186; *Leach v. Church*, 15 Ohio St., 169; *Merrick v. Boury & Sons*, 4 Ohio St., 60; *Crumbaugh v. Kugler*, 3 Ohio St., 544, and *Hauenschild v. Standard Coffin Co.*, 8 N. P., 124; 10 Dec. 536.

The law is that where a new note is given to take up an indebtedness, the presumption is that it is in conditional payment and not absolute payment of the obligation. It will be absolute payment of an obligation if such is the express or implied agreement of the parties. It follows, therefore, that the giving of the new notes constituted payment of the old obligations if, and only if, that was the intention of the parties.

While a note is a mercantile specialty, and for some purposes may be regarded as the obligation itself, it is possible to have an obligation independent of it, and of which it is merely the evidence. *Dick v. Hyler*, 94 Ohio St., 351, and *First Nat. Bank v. Patton, supra*.

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The referee and the court below found in the case at bar that the intention of the parties was that the old obligation should continue to exist, and that the several renewals constituted but a change in the evidence of the debt. While we might not be disposed to take the same view of the evidence, we do not regard the findings as against the manifest weight of the evidence, and therefore we can not set them aside.

The findings of fact by the referee are given the same effect as a special verdict of a jury. *Lawson v. Bissel*, 7 Ohio St., 130, 133, and *Cincinnati & E. Elec. Ry. v. Ritty*, 21 C. C. (N. S.), 568. See also *Merrick v. Boury & Sons, supra*.

Our doubts are strongest as to the instances in which the notes were renewed at the time that the brewing company had ample funds in the bank. It is not possible, however, to renew or continue an existing obligation at a bank merely because there are adequate funds available there for its payment. We hold, therefore, that the double liability arises in respect to all of the notes held by the bank.

Interest recoverable as damages follows the principal as an incident to it unless it is separated and set apart as a particular debt. *Ohio City v. Cleveland & T. Ry.*, 6 Ohio St., 490, and 22 Cyc., 1570.

If there was a double liability as to the amount of the notes, the interest would follow the same rule.

Robert M. Kuerze died June 10, 1903. His will named Elizabeth Kuerze, his widow, as residuary legatee. She accepted the appointment, qualified as executrix, and elected to take under the will. At that time she was already the owner of 2,900 shares of stock in the brewing company. On August 24, 1903, she caused 700 shares of the stock standing in the name of her husband to be transferred to her own name, thus increasing her holdings as shown by the books of the company to 3,600 shares.

On September 30, 1908, the Gerke Brewing Company declared a dividend of 22½ per cent., payable in real estate. This was ordered by the company to be transferred to Elizabeth Kuerze in her individual name.

Defendants in error contend that the transfer of the 700 shares constituted an acceptance of the legacy, and thereby made Elizabeth Kuerze at least the equitable owner of all of the stock of her former husband. It is urged that she can not accept the legacy in part, and reject in part, and that by accepting the dividends she is estopped to deny her ownership of the stock.

It is true that Mrs. Kuerze, by her election to take under the will, is disabled from contesting its validity.

In regard to the estoppel, it is sufficient to say that the bank was not misled by any misrepresentations made by her. There is no basis for any estoppel in the sense in which the word is used by counsel. *Ellard v. Ferris*, 91 Ohio St., 339, 353. See also *Colored Industrial School of Cincinnati v. Bates*, 90 Ohio St., 228.

Nor does her transfer of the 700 shares constitute her the owner of the shares not transferred. It would rather indicate that she was not their owner. The claim overlooks the distinction between a specific and a general legacy. While the right of a distributee vests at the death of a testator (*Armstrong v. Grandin*, 39 Ohio St., 368, and *Conger v. Barker's Admr.*, 11 Ohio St., 1), it is subject to distribution. A residuary legatee is entitled only to what remains after all the debts of an estate are paid. It is only after such payments have been made that an executor should pay the legacies at all. In any event, however, there must be some affirmative act to transfer any assets from the executor to the legatee. This subject is covered in 2 Schouler, Wills (5 ed.), Sec. 1488, a part of which is as follows:

"Where an executor is himself a legatee, assent to his own legacy is needful. And, until his express or implied assent to the legacy has been given in such case, the qualified executor holds the specified thing or fund in his representative capacity, even though all the debts have been paid; for the rule is, that one's assent can not be inferred from acts equally applicable to the title of legatee and executor. If the executor is residuary legatee he occupies such dual relation to the estate that the court retains control of his official acts until the estate is administered and the residue turned over properly."

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The foregoing is in accord with 2 Williams, Executors, pp. 1225, 1233 (bottom paging).

The point is treated in Roebling Sons Co. v. Shawnee Valley Coal & Iron Co., 4 N. P. (N. S.), 113, 116, 117.

It is urged, however, that the real estate "dividend" was a dividend upon all the stock, including that which is in the name of Robert M. Kuerze on the books. If there had been a dividend in cash it would have been an asset of the estate, like any other asset, and the payment thereof as a partial distribution would not constitute a distribution of the stock on which the dividends accrued.

When a company makes a distribution of its assets in the form of a dividend in real estate, it is not unreasonable for the executrix to take the stock in her own name individually, but for the estate. Nor would it be improper in making partial distribution of the estate to make the deed direct to her as an individual, and for her own benefit. Complications might and no doubt would ensue if the real estate were to come into her hands as executrix and she were to execute a deed as executrix. Executors and administrators normally do not administer real estate.

In regard to the liability of a legatee who has assented to take a general legacy the case of *Matter of Bingham*, 127 N. Y., 296, is in point. The question there arose upon double liability of national bank stock, which the administrator had never transferred to himself on the books, although he had accepted the legacy. The court say:

"The residuary interest in the stock after payment of the debts of his intestate belonged to him, but while he held the relation of administrator, which he could terminate only through a final judicial settlement of his accounts, it is not seen how he could be treated as having the legal title to the stock other than in his representative capacity. An administrator may, however, after the expiration of the time prescribed by statute for the presentation of claims by creditors, make distribution of the assets to the next of kin, and not be chargeable to those whose claims were not presented. (2 R. S., 89, Sec. 39; *Erwin v. Loper*, 43 N. Y., 521). This is not applicable to retention by the administrator, who is also next of kin, and has not been

discharged by and upon judicial settlement of his accounts from that relation. But if in this instance he had procured a transfer upon the bank books of the stock to himself individually a different question may have been presented. There was no error in not treating the assessment upon the fifty shares as the debt of James Faulkner, deceased."

See the same case *In re Faulkner's Estate*, 10 N. Y. Supp., 325.

Even if Mrs. Kuerze were to be regarded as the owner of the rest of the stock that belonged to her husband, by reason of any estoppel or taking possession thereof in 1908, it is by no means clear that such transfer of stock after the change in the double liability law would impose upon her the obligation to satisfy creditors, whose claims had existed prior to 1903; but it is unnecessary to decide that point.

It follows, then, that, although there is a double liability as to each of the debts held by the bank, established in the court below, Mrs. Kuerze is liable only as the holder of 3,600 shares of stock.

The judgment should be modified in accordance with the above and as modified will be affirmed.

JONES, P. J., and HAMILTON, J., concur.

**CONSTRUCTIVE FRAUDULENT INTENT IN DEEDING  
PROPERTY TO WIFE.**

Court of Appeals for Hamilton County.

HUWE v. KNECHT ET AL.

Decided, April 7, 1919.

*Husband and Wife—Gift of Real Estate to Wife—Constructive Fraudulent as to Creditors—Release of Dower Insufficient Consideration for Conveyance to Wife, When—Sections 11104 and 11105 Relating to Fraudulent Transfers.*

1. A conveyance of real estate by a husband to his wife as a gift will be set aside as having been made in fraud of creditors, where it is disclosed that the husband has not sufficient assets to permit him to make a gift and is unable to pay his debts.
2. Section 11105, General Code, making knowledge of fraudulent intent material, applies only to Section 11104, General Code, relating to transfers in contemplation of insolvency or to prefer creditors, and not to Section 8618, General Code, invalidating gifts to defraud creditors. Hence, the transfer by a husband of his unencumbered property to his wife, thereby providing a home in which he can live and thus defeating the rights of his existing creditors, is constructively fraudulent and void, even though no actual fraud was intended.
3. The act of a wife in releasing her dower interest in other property is not sufficient consideration to support such a conveyance, where the value of the property received by the wife is unreasonably disproportionate to the dower interest released by her.
4. An action to set aside a fraudulent conveyance, instituted four months before defendant petitioned in bankruptcy, does not create a lien upon the property of the bankrupt; but the lien of a judgment creditor is superior to that of trustee in bankruptcy, and the discharge of the debtor being a personal defense does not defeat the rights of the lien-holder in the property.

*Kramer & Bettman*, for plaintiff.

*John W. Peck*, for defendants.

**SHOHL, P. J.**

This case was heard on appeal. The original action was brought by Katherine Knecht Huwe against her brother, Victor

E. Knecht, and Emma S. Knecht, his wife, to set aside a conveyance alleged to have been made in fraud of her rights as a creditor.

The father of plaintiff and her defendant brother died in 1905, leaving a substantial estate, consisting among other things of stock in the Victor Knecht Company, a foundry located in Cincinnati. In 1906, defendant, Victor E. Knecht, purchased of his sister her 39 shares in the Victor Knecht Company. There was a payment of \$1,000 May 21, 1906, and a series of notes, \$3,500 being dated June 19, 1906, and \$7,200 dated November 17, 1906. With his other stock this gave Victor E. Knecht the controlling interest in the company, of which he was president and general manager. Under his operation the business was interrupted by strikes, and, according to his testimony, after the year 1907 it got worse and worse.

Defendant went security for one of his brothers and was called upon to pay a note of \$11,500, on which he was an endorser. To obtain this money, application was made to the Western German Bank, and on April 16, 1909, he mortgaged to the bank his interest in the real estate inherited from his father, joining with his brothers, who did likewise, to secure a loan of \$11,500, and hypothecating at the same time his 124 shares of stock of the Victor Knecht Company, which were his total holdings exclusive of the 39 shares which the plaintiff held as collateral to her notes. In addition to the above, he was also indebted to the bank in the sum of \$4,600. On the same day the Victor Knecht Company executed a mortgage on certain of its real estate to secure an indebtedness then existing amounting to \$16,000. At the time of the mortgage, above referred to, defendant, Emma S. Knecht, signed a waiver of her dower rights, and defendants both testified that it was agreed between them at that time that she would be given the home in consideration of her releasing dower.

On June 19, 1909, the first of plaintiff's notes, in the sum of \$1,500, fell due. The evidence shows that plaintiff was demanding payment at the time, and her brother, the defendant, professed his inability to pay it. On June 29, ten days there-

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after, he conveyed the home to his wife. This is the property involved in this action.

It is contended that the transfer to the wife constituted a gift, or rather a partial gift; that Knecht was not possessed of sufficient means to meet his existing obligations and that as against the plaintiff, an existing creditor, the transaction was voidable and should be set aside. The evidence shows that defendant was largely indebted, and owed according to his own testimony \$11,500 to the Western German Bank, as joint maker on a note; he owed the further sum of \$4,600 to the bank; he owed the plaintiff \$10,700, and his sister-in-law, Mrs. Peter Knecht, about \$300, making a total of \$27,100. His assets consisted of the shares of stock of the Knecht Company, all of which were hypothecated; a one-sixth interest in his father's real estate, the whole of which he testified was worth \$30,000, but which sold in partition for less than \$22,000, the value of his interest therefore being somewhere between \$3,500 and \$5,000; he also owned a two-thirds interest in a farm, his interest being valued at \$2,000. His only other asset beside the property now in suit was the stock in the Victor Knecht Company. On the witness stand he stated that in his opinion it was valuable, being worth in the neighborhood of \$300 a share. The evidence does not warrant us in adopting his opinion. All the evidence in the case shows the business had been going backward for several years. It could hardly be classed as a going concern. It was not doing business, nor attempting to do any, with intermittent exceptions. It had paid no dividends since 1906. It was unable to pay its notes as they matured, and was finally required by the bank to mortgage its real estate to secure its obligations there. Defendant claimed to be entitled to a salary of \$3,000 a year, but only drew \$30 or \$35 a week, stating on the witness stand that he could not draw more as he did not wish to drain the business. He was only able to pay the interest to Mrs. Huwe in small installments, because the condition of the business would not permit him to draw any more money from it. After giving full weight to all the evidence, facts and circumstances of the case, the court has reached the conclusion

that the stock was not worth anything like \$300 a share; it could not be sold in the market. It was certainly not worth its par value in 1909. The circumstances show that long before the receivership of July 17, 1913, the company was unable to meet its obligations as they matured.

We conclude that defendant, Victor E. Knecht, did not have sufficient assets to permit him to make a gift. As was stated in *Crumbaugh et al. v. Kugler et al.*, 2 Ohio St., 373:

"A person largely indebted can not give away his property without amply providing for the payment of his debts. The suspicion of a fraudulent *intention* in making such gift may, in many such cases, be removed by proper evidence, but the question always remains whether the conveyance operated to the prejudice of creditors.

"Such a gift is never upheld unless property is retained, clearly and beyond doubt, sufficient to pay all the donor's debts."

See also *Brice v. Myers et al.*, 5 Ohio, 121; *Miller et al. v. Wilson et al.*, 15 Ohio, 108; *Oliver v. Moore et al.*, 23 Ohio St., 473; *Evans et al. v. Lewis*, 30 Ohio St., 11, and *Walston v. McCabe et al.*, 11 N. P., (N. S.), 26.

It is claimed, however, that Mrs. Knecht gave consideration for the transfer by releasing her dower in the property covered by the mortgage to the Western German Bank, and the case of *Singree v. Welch and Wife*, 32 Ohio St., 320, was cited. In that case, for property that was worth \$500, the wife relinquished dower in land located in Illinois in which the value of her dower right was estimated at \$230. In the case at bar, the evidence shows that the property was worth over \$5,400, and the value of defendant's contingent dower in her husband's share of the estate of his father, even if the entire property was worth what defendant claimed, calculated on the mortality tables, would amount to \$279. In the case of *Singree v. Welch*, the court says, at page 324:

"For the purpose of this case it may be conceded, that if the wife claimed and received for her rights in her husband's estate, an amount so entirely disproportionate to its value, as to be altogether unreasonable, and shocking to the moral sense, she

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might be held, as in the nature of a trustee for her husband's creditors."

The disproportion in the case at bar is altogether unreasonable, so that while there was a semblance of consideration, or of partial consideration, there was a very substantial partial gift out of the estate that should have been used to pay the husband's creditors. Part consideration is not inconsistent with the doctrine of *Crumbaugh v. Kugler*, 2 Ohio St., 373, 378, nor with the rule in *Oliver v. Moore et al.*, 23 Ohio St., 473, 481.

Defendants call to the attention of the court the case of *Lytle et al. v. Baldinger et al.*, 84 Ohio St., 1. In a situation in which the doctrine of that case is applicable, this court will follow the rule laid down by the Supreme Court until that tribunal should make a further decision in respect to the statute therein referred to. The syllabus, however, refers only to transactions in violation of Section 6343, Revised Statutes, now Sections 11104 and 11105, General Code. The act of which these original sections were a part is in the chapter on Insolvent Debtors. There are other provisions of the code upon which plaintiff relies. Without passing upon her contention that she has further rights at common law, Section 8618, General Code, provides:

"Every gift, grant, or conveyance of lands, tenements, hereditaments, rents, goods or chattels, and every bond, judgment or execution, made or obtained with intent to defraud creditors of their just and lawful debts or damages, or to defraud or to deceive the person or persons purchasing such lands, tenements, hereditaments, rents, goods or chattels, shall be utterly void and of no effect."

That section is the modern successor to the Statute of Elizabeth referred to in the case of *Brice v. Myers et al.*, 5 Ohio, 121, where the court says, at page 123:

"To enforce these principles, to prevent creditors from suffering by their violation, was the object of the statute of the 13 Eliz. c. 5, and is the object of that part of the second section of our statute for the prevention of frauds and perjuries, which relates to creditors. As to the relief of creditors these statutes

are co-extensive; each makes void conveyances made with 'intent' to defraud creditors; they are declarative only of the common law, which, as now understood, would, without the statutes, have effected all that can be effected with them. The statute of Eliz., as to the relief of creditors, has, from its enactment, in courts both of law and equity, uniformly received a most liberal construction, notwithstanding it subjects the committers of the forbidden fraud to a prosecution for a penalty."

If a man who is largely indebted transfers all of his unencumbered property to his wife, thereby providing a home in which he can live, and thus defeating the rights of his existing creditors, the transfer is constructively fraudulent and void under Section 8618, General Code, even though no actual fraud was intended. See *Crumbaugh v. Kugler, supra*, at page 378. To hold that the transferee must have knowledge of the fraudulent intent in such a case, where no fraudulent intent is necessary, involves a confusion of thought.

Section 11105, General Code, does not by its terms apply to Section 8618, but only to 11104, the section immediately preceding it. We will not extend the doctrine of *Lytle v. Baldinger, supra*, to make it cover sections other than the one to which it specifically refers. It will take clear statutory language to warrant a court in imposing upon a creditor seeking relief the obligation to show that the wife had guilty knowledge. In the case at bar the wife admitted on the witness stand that she knew of his obligations and that she did not know what assets he had to meet them. In view of our conclusions of law, hereinbefore stated, it becomes unnecessary to determine whether such knowledge put her on inquiry sufficiently to charge her with bad faith. Unless otherwise barred, plaintiff would be entitled to set aside the transfer.

It appears that on April 21, 1915, the defendant, Victor E. Knecht, was adjudicated a bankrupt. In the schedules in the bankruptcy case plaintiff was listed as a creditor on \$10,700 worth of notes. On December 27, 1915, the bankrupt was discharged, and during the hearing of this cause in this court defendant by leave filed a supplemental answer setting up the facts in

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connection with the bankruptcy case as a defense to this action. To this defense plaintiff made several contentions. as follows:

In Remington on Bankruptcy (2 ed.), Sec. 1591, the rule is stated as follows:

*"Fraudulent transfer, suits instituted before four months.* Suits to set aside fraudulent transfers instituted more than four months preceding bankruptcy may not be enjoined, nor may the property be ordered turned over to the trustee in bankruptcy." (Citing *Pickens v. Roy*, 187 U. S., 177; *Natl. Bank of Republic v. Hobbs*, 118 Fed. Rep., 626, and *In re Kavanaugh*, 99 Fed. Rep., 928).

The most important decisions involved in a determination of the question are *Metcalf v. Barker*, 187 U. S., 165, and *Pickens v. Roy*, *Id.*, 177. In each of these cases the action was by a judgment creditor. They establish that when a judgment creditor files his bill in equity more than four months prior to the bankruptcy of the defendant, thereby obtaining a lien on specific assets, and diligently a lien on the property of the bankrupt, which is superior to the title of the trustee in bankruptcy. The lien created by a judgment creditor's bill is contingent in the sense that it is subject to being defeated if the suit is unsuccessful, but it is inchoate and becomes a specific charge or lien upon its successful termination. This lien, if it arises more than four months prior to the petition in bankruptcy, is respected in bankruptcy, and the discharge of the debtor, being a personal defense, does not release the rights of the lienholder in the property. The rule is based upon the recognition and enforcement of pre-existing liens not arising within four months of the petition in bankruptcy. See 2 Loveland on Bankruptcy, Section 749, and Collier on Bankruptcy (11 ed.), 402, 403. When a judgment is obtained, the judgment creditor has a lien upon the lands of the judgment debtor in the county in which the judgment is rendered. (Section 11656, General Code). If a debtor has attempted to convey away the land in fraud of his creditors, it equitably remains his, and when the fraud is determined and the transfer set aside it is regarded as affected

by the lien which would have attached by operation of the statute if the property had never been transferred. Plaintiff contends that a strict lien is not necessary, but further urges that creditors' suits and like actions create a lien sufficient for the purposes of such an action, citing 25 Cyc., 1457, and 20 Cyc., 826. They are as follows:

"25 Cyc., 1457-C. *Creditors' suits and like actions.* A lien is acquired by the filing of a strict creditor's bill to subject property not reachable by execution at law, or by the filing of a bill by a creditor to set aside a fraudulent conveyance by his debtor."

"20 Cyc., 826. A creditor who during the life of his debtor brings a suit to set aside as fraudulent a conveyance or transfer made by such debtor acquires a lien on the property covered by such conveyance or transfer, and becomes entitled to the payment of his claim in preference to other creditors, unless it is otherwise provided by statute."

An examination of all the cases cited in the notes to the foregoing leads us to the conclusion that while the weight of authority supports the text, many of the decisions are founded upon the construction of local statutes. Judgment liens in Ohio are purely of statutory creation. (*Stanton, Sheldon & Co. v. Keyes et al.*, 14 Ohio St., 443, 446. We are not convinced that the bringing of such an action by a creditor, other than a judgment creditor, creates a lien in Ohio.

It appears in this case, however, that on the same day on which this original action was filed, to-wit, June 14, 1912, suit was brought on \$5,700 of the notes which formed the basis of this action. That case proceeded to a determination, and on March 3, 1913, a part of the notes on which this suit was based ripened into a judgment for \$5,700 and costs. It appears, therefore, that the plaintiff herein is armed with a judgment and was a judgment creditor more than four months prior to the bankruptcy proceedings. Her rights, therefore, should be no less than those of the original plaintiffs in *Metcalf v. Barker and Pickens v. Roy, supra*. See also *Flint v. Chaloupka*, 78 Neb., 594; *Blick v. Nimmo*, 121 Md., 139; *Stevenson v. Bird*, 168 Ala., 422, and *Board of Directors v. Lowrance*, 43 Amer.

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B. R., 31 (South Carolina, 1919). The last-named decisions show the application of the doctrine. Relief was granted to plaintiffs setting aside fraudulent conveyances, although bankruptcy supervened.

The plaintiff is entitled to a decree. The court, however, will grant relief on terms. It appears that Mrs. Knecht relinquished dower worth \$279, according to calculations based on figures given by her husband. If the transfer is to be set aside the decree will be conditioned upon the securing to her of that amount. In view of the fact that the defendants have had the occupancy of the premises in question during the controversy, no interest will be allowed on that sum. The right of Emma S. Knecht to contingent dower in the premises in controversy will be left as it was prior to the transfer by Victor E. Knecht, which will be ordered set aside in accordance with the above. A decree may be presented accordingly.

HAMILTON and CUSHING, JJ., concur.

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**GRANT OF USE OF A PRIVATE RIGHT-OF-WAY HELD TO INCLUDE USE FOR ALL PURPOSES.**

Court of Appeals for Lake County.

**REALTY TITLE & INVESTMENT CO. v. FAIRPORT, PAINESVILLE & EASTERN RY. CO. ET AL.**

Decided, September 17, 1919.

***Easements—Uses Acquired in a Private Right-of-Way Appurtenant to the Lot Conveyed—Right to Lay a Pipe Line Across such Right-of-Way.***

1. The conveyance by deed of a lot in an allotment, which deed contains a grant as an appurtenance to said lot of a perpetual right to the grantee, his heirs and assigns, to use and enjoy but in common with the owners of the residue of said allotment, a private way for pleasure, recreation, amusement, health, and travel, con-

fers on the owner of said lot the right to use said private way as a means of ingress and egress for any and all purposes to which said lot may be adapted.

2. The owner of such a lot has the right to lay pipe lines across such a private way, beneath the surface, for the purpose of mining and removing any mineral product that may be discovered thereon, provided such use of said private way is reasonably necessary in mining and transporting the mineral discovered thereon, and does not unreasonably interfere with the use and enjoyment of said way by the owners of the residue.

*Harry T. Nolan*, for plaintiff.

*Harry E. Hammar*, for defendants.

POLLOCK, J.

This action comes into this court on appeal, and was submitted on the pleadings, testimony and argument of counsel.

In 1899 plaintiff owned a tract of land lying between the Fairport public road and Lake Erie, in Painesville township, Lake county, and east of the village of Fairport. Some time during that year the plaintiff platted this land into lots and tracts of land, making a private way forty feet wide, extending from the Fairport road to Lake Erie, through the center of this tract, and some wide ways intersecting this main way. This plat was recorded in the recorder's office of Lake county. Lot or tract number nineteen was on the east side of this center way, and lot or tract number eighteen was on the west side. The company, after this allotment was made, sold the lots therein by a deed containing a condition regarding the use of this private way, which will be referred to hereafter, retaining in itself the legal title to this way. The Fairport, Painesville & Eastern Railroad Company, some time prior to the commencement of these proceedings, became the owner of lot number nineteen, and also of a strip of land extending along the north side of lot number eighteen to this center right of way, and obtained from the plaintiff a grant to build and operate its railway over this center right of way.

The Diamond Alkali Company, defendant in error, was for some time prior to the commencement of these proceedings

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engaged in the manufacture of alkali products, its plant being situated on the west side of this allotment. It obtains its product by drilling deep wells down to the salt or alkali mineral, and water is conveyed to these wells and forced down into them for the purpose of making a brine of the alkali mineral or salt, and that is pumped out of the wells and transported in pipe lines to its plant and manufactured into alkali products.

Prior to the bringing of this action the alkali company had obtained a lease or a conveyance from the defendant railroad company of lot number nineteen for the purpose of drilling and producing alkali salt from wells which it intended to open on this lot, and was proceeding to lay a pipe line through the strip of ground acquired by the railroad company along the north side of lot number eighteen and across this center way, the legal title to which was retained by the realty company, to wells which it drilled on lot number nineteen, and also to lay a pipe line from the wells across this same center way to its alkali plant on the west side of this allotment. It was intending to lay these pipes in trenches below the surface across this center way. This action was brought to enjoin the alkali company from laying its pipes across this strip of land.

The Diamond Alkali company admits its intention of laying the pipe lines as alleged in the petition, but claims it has a right to do so under the deed made to its predecessor in title by the plaintiff in this action. All the subsequent conveyances from that time down to the conveyance to the railroad company contained like conditions in regard to the use of this center private right of way.

At the time this allotment was made by the plaintiff the purpose was supposed to be, or the object intended at that time was, to make or develop a summer resort. The supposition was that the lots would be built on for residences, either permanent or summer residences for the owners themselves, or for boarding and rooming houses for the people who might visit there during the summer season. It also appears that since this alkali product was discovered on this property and in the adjoining neighbor-

hood the property has ceased to be used as a summer resort. The condition in the deed of the plaintiff in regard to this center private way extending from the Fairport road to Lake Erie reads as follows:

"To have and to hold the same, together with all appurtenances, privileges and easements hereinafter mentioned, forever, and the said grantor, in consideration of the premises and the mutual covenants herein mentioned, does hereby give and grant unto the said grantee, his heirs and assigns, a perpetual right to use and enjoy, but in common, notwithstanding, with the owners of the residue of said allotment, so much of the bank and beach bordering on the lake described on plat of said allotment as Reserve 'B' as lies east of the west line of the north and south center road extended to the lake, together with the use of the private ways and drives in said plat described as lies east of the west line of said north and south center road, reference to which is hereby made; said reserve, ways, and drives to be used for the pleasure, recreation, amusement, health and travel of the owners of said allotment and for no other purposes."

This strip of ground, under the above conditions, was to be used by the owners of the several lots for pleasure, recreation, amusement, health and travel, and for no other purpose. The present owners of the lot could convey to the alkali company no greater right to use this center way than it possessed by reason of this condition. It is claimed on the part of the alkali company, but strenuously denied by the plaintiff, that this condition gives to the company the right to transport water across this private way on this lot for the purpose of producing this alkali salt and to transfer the salt brine off of this lot by means of pipes under the ground.

This provision in the deed, taking into consideration what the parties evidently had in their minds at the time this allotment was made and these deeds given, gave to the owner of the lot the right to use this private way as ingress and egress to his property. Every use of this private way as a means of ingress and egress, to the full and free enjoyment of the lot sold, passed to the grantees of the several lots conveyed by the deeds containing the condition referred to. It is true that

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all the words characterizing the use of this lot were indicative of a pleasure resore, except the last two, which provide for health and travel, but the last word, "travel," if the others do not convey that meaning, clearly shows the intention of the parties to the several deeds that the way was intended as a means of ingress and egress to the property for its full enjoyment. This especially appears when we consider that this way, and the other crossways which were subject to the same conditions, were the only means of ingress and egress to these lots. This deed gave to the owners of the lots the right to use this way to carry off whatever products might be raised or produced on the lots, whether they were products which the parties had in mind when they contracted, or products the result of new uses to which the lots had been subjected. They would have a right also to transport over this right of way whatever might be needed either for the owner's enjoyment while on the lot, or for use in producing whatever he might desire to produce on his property. When a party grants rights over his property for ingress and egress to the property of another, he not only contracts with reference to the then use but to any future use that the owner of the dominant estate may deem profitable or desirable. This is referred to in the case of *Arnold v. Fee*, 148 N. Y., 214 (42 N. E. 588), as follows:

"A deed to a lot bounded on an alley recited, after the description of the premises, that the conveyance was with the privilege of the main alley leading to the "Palace Stables," so called, as an easement for ingress and egress along the north line or alley line on the premises hereby deeded, for the distance of 98 feet west from Franklin street, and no more, and for no other purpose." *Held*: that the right of way was for ingress and egress necessary for any business which the grantee might conduct on the premises, and was not extinguished by the change in the use of the premises."

So that the parties owning lot number nineteen had a right to use this right of way to carry away from said lot anything produced thereon, whether such products were in the minds of the parties at the time of the conveyance or not, and they

have the right in the ordinary way to carry on to the lot over said way whatever might be necessary for the enjoyment or business which the owner might be conducting thereon. Such grants are not made for present use alone, but involve modern discoveries and development in the world's progress. Years past, when we were using horse-drawn vehicles, rights of way were granted by one party to another across his property. The parties had in mind at that time that such use would be made of the way granted, but since that time automobiles and motor trucks have come into use and there is no question that the owner of the dominant estate has a right to travel over these ways with this new means of transportation.

It is claimed that because the alkali company is intending to take, through pipe lines laid across this strip, necessary water to mine the mineral that has been discovered since the conveyance of this property by the plaintiff, and then take this mined mineral through pipe lines across this strip of ground, it is exceeding the use conveyed by plaintiff to its predecessor in title, under the provision referred to. We think that the provision referred to did give the owner of the lot the right to mine and transport this mineral across this strip, in the ordinary way such mineral products are mined and transported. It is not claimed the way that the alkali company proposes to use this strip would interfere with any use which the plaintiff is now making of this strip, or any use that it could make under the conditions in the deed conveying the lot; neither is it claimed it will interfere with any rights that the adjoining lot owners may have in this strip. All the plaintiff claims is that such use is an invasion of its legal right in the strip.

The proof shows that this is the usual and only practical way of mining and transporting this mineral to the alkali plant.

The New York court of appeals, in the case of *Marvin v. Brewster Iron Mining Co.*, 55 N. Y., 538, said in the opinion, at page 551:

"The necessity which is to govern is not fixed and unvarying. The right may be exercised in a manner suitable to the business to be carried on. Such is the principle of the deci-

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sion in the analogous case of *Gayford v. Moffatt*, (Law Rep. [4 Ch. App.], 133), where it is held that a lessee of an inner close, becomes entitled to a right of way through an outer close, and that the way afforded to him must be suitable to the business to be carried on by him, on the premises demised. And what is, perhaps, but an expansion of the last proposition, the exercise of the right is not to be confined to the modes in vogue when it was first acquired. The owner of the mine may keep pace with the progress of invention and ingenuity, so far as is necessary to a profitable working of his property in competition with rivals."

No doubt when this deed was made by the plaintiff neither of the parties thereto thought that such a product would ever be found on this property, or such a use would be made of this right of way, but it is a discovery of a new value of the lot which requires a new way of developing and transporting the product.

The case of the *New York Carbonic Acid Gas Co. v. Geyser Natural Carbonic Acid Gas Co.*, 72 N. Y. Supp., 354, contains an issue somewhat similar. The plaintiff had a right of way over the defendant's premises, and he was seeking to transport by pipe line some kind of mineral water to a plant on his property across this right of way for the purpose of marketing this mineral water. The court there held:

"Where plaintiff has acquired a right of way to certain lands upon which a spring was located, it had a right to lay a pipe for conducting gas from such spring on the whole right of way on the surface, or sink it below the frost line."

In the opinion, on page 357, the court refers to the right to use such a way by laying pipes thereon as follows:

"It is strongly urged by the defendant's counsel that the privilege of passage means purely a passage over the lands and broken road, and does not extend to the laying of pipes within the protection of the soil. It would seem that a two-inch pipe, placed out of sight, would not in the slightest degree vex or disturb the defendant in the use it makes of its own land, and that an occupation by horses and drags with heavy loads would be to the defendant a matter of more seri-

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ous disturbance. But I can not agree with the position taken by the defendant in this respect. The right of passage to transport commodities is a right which is adapted to a reasonable use under the varying conditions of business life, and is not measured by the exact form of the transporting vehicle, or the number of times it is used. Such an easement is a grant of practical benefit so far as is consistent with the purpose of the thing granted, and not destructive to the rights of the owner of the servient tenement."

The supreme court of Alabama, in the case of *Williams v. Gibson*, 84 Ala., 228 (4 So. 350), in speaking of the rights of a mine owner against the owner of the overburden or superstructure, say at page 234:

"But he is not limited, as we have already said, to such appliances as were in existence when the grant was made, but may keep pace with the progress of society and of modern invention."

We think the principle is universally applied to such grants of ways over one's property that the contract is made with a view of future developments and discoveries upon the property conveyed, and that the party has a right to use the way granted as may be necessary for the new use to which he has subjected his property. We think the alkali company has a right to use this private way as intended by it, and plaintiff's petition will be dismissed.

METCALFE and FARR, JJ., concur.

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**LEASE OF CANAL LANDS CONSTRUED AS AN EASEMENT.**

Court of Appeals for Hamilton County.

**CLIFTON SPRINGS DISTILLING CO. ET AL. v. STATE.**

Decided, July 7, 1919.

*Canals—Right of Way Through Municipality—Leased to City for Street and Other Purposes—Right Thus Conveyed Held to be an Easement, the Fee Title Remaining in the State.*

The state of Ohio leased to the city of Cincinnati certain canal lands located within said city, the lease being executed under authority of a special act of the Legislature, entitled "An act to provide for leasing a part of the Miami and Erie canal to the city of Cincinnati as a public street or boulevard and for sewerage and subway purposes" found in 102 O. L., 168. The act provided that the city could improve and occupy the canal lands as a public street or boulevard and for sewage, conduit and subway purposes, conditioned that the city should construct suitable works for a convenient outlet for the discharge of water from the canal at a specified point so as not to obstruct the flow of water through the remaining part of the canal or destroy the present supply of water for commercial purposes, and further that the city should construct works for supplying water to lessee users along the portion of the canal to be abandoned in order that the state might carry out its existing contract obligations with lessee users of said water. The city paid all installments of rent due under the lease, but never entered upon or improved the lands or complied with any of the conditions of the lease. Under such facts the lease granted only an easement to the city, the fee title remaining in the state. The construction by the city of improvements, the giving of the bond and the filing of the plans and specifications contemplated by the act were conditions precedent to taking possession, and until such conditions are performed the city acquires no right to rentals for navigation, to the exclusion of the state.

*Maxwell & Ramsey*, for Clifton Springs Distilling Co.

*Saul Zielonka*, City Solicitor, and *Harry R. Weber*, Asst. City Solicitor, for city of Cincinnati.

*George T. Poor*, special counsel, and *Simeon M. Johnson*, special counsel, for the state of Ohio.

HAMILTON, J.

Heard on error.

The statement of the case, the claims under the petition, the position assumed by the distilling company in its answer, and the claims of the city of Cincinnati in its petition, are correctly and fully set forth in the agreed statement of facts, which is incorporated in the bill of exceptions as follows:

AGREED STATEMENT OF FACTS.

"In the petition plaintiff claimed from the defendant \$1,361.33 for the use of part of the canal system of the state of Ohio by the defendant for carrying goods and merchandise in canal boats from October 1, 1912, to August 31, 1917, at the rate of 15 cents per mile, so traveled by the canal boats as used by the defendant.

"The defendant filed an answer admitting the amount claimed and stating that without collusion with it, the city of Cincinnati claimed said sum and had notified said defendant not to pay the same. The city's claim arose under a lease of said canal from the state of Ohio under certain acts of the legislature. The defendant, Clifton Springs Distilling Co., was permitted to pay the above sum of money into court under its claim of interpleader. Whereupon the city of Cincinnati was made a party defendant and filed its answer. The state of Ohio then filed a reply. The question for decision is which of these two is entitled to the above fund now in the hands of the clerk of this court. The agreed facts are as follows:

"The city of Cincinnati is a municipal corporation under the laws of Ohio. The statement of the petition as to the sum of \$1,361.33 being due from the original defendant as above set out, is also admitted. The Clifton Springs Distilling Co.'s place of business is situated on the canal on Ludlow Avenue and the Baltimore & O. S. W. Ry. The governor of the state of Ohio executed and delivered to the city of Cincinnati on August 29, 1912, and on January 6, 1917, the leases attached to the answer of the defendant, The city of Cincinnati. The city of Cincinnati paid all installments of rental under said leases up to April 1, 1918, the last semi-annual payment of the city being made in advance on October 11, 1918.

"The city of Cincinnati never entered upon, improved or occupied as a public street or boulevard, or for sewerage, conduit or for any other purpose or purposes, all or any part of

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the Miami and Erie Canal described in the leases to the defendant, or in any acts of the general assembly under which said leases were made. No plans and specifications were ever drawn or approved by the state engineer for a convenient outlet for the discharge of the water of the said Miami and Erie Canal at a point 300 feet north of Mitchell avenue, or at any other point so as not to obstruct the flow of water through the remaining part of the canal, or so as not to destroy or injure the present supply of water for mechanical or commercial purposes. No bond in any amount has been prescribed by the state board of public works or approved by the attorney-general of Ohio for the faithful performance of said work or given by the city of Cincinnati for such performance. The city of Cincinnati has never constructed or caused to be constructed suitable and sufficient works for a convenient outlet for the discharge of the water of said Miami and Erie Canal at any point so as not to obstruct the flow of water through the remaining part of said canal and so as not to destroy or injure the supply of water as it existed at the date of the passage of the several legislative acts of 1911, for mechanical or commercial purposes. Said city has never adopted or constructed, either under said acts or at all, appropriate works, or any works, for the purpose of supplying water to the lessee users of said water of the Miami and Erie Canal along that portion of said canal to be abandoned in order to enable and for the purpose of enabling the state of Ohio fully, or in any other way to carry out and discharge the obligations resting upon it by virtue of certain contracts subsisting at the passage of the act of 1911, to and in force between the state of Ohio and said lessee water users during the remainder of the terms of said contracts in the same quantity and under the same conditions and at the same rate of rental provided for in said contracts.

"The state of Ohio for many years prior to May 15, 1911, and continuously ever since, has been in possession of all that portion of the Miami Canal described in all the foregoing acts, and of the property described in the leases attached to the answer of the defendant, the city of Cincinnati, using said canal as a navigable stream, flowing the waters through said portion of the canal for navigation and public purposes and that such portion of said canal, and particularly that portion thereof for navigation of which tolls were charged to the original defendant herein and for which this action was brought, always have been and were during the period for which said tolls were charged used for navigation and for public purposes

by the state of Ohio and the people of the state during all the time aforesaid. In this behalf and regard said plaintiff, state of Ohio, during all the time aforesaid, maintained all of said property, including the banks and bed of the canal, as well as all other parts thereof, and exercised care and supervision over all said property during all the time aforesaid and which it still continues to do, through its state officers, servants, agents and employes, at all times at expense and outlay to the plaintiff, the state of Ohio, expending for the purposes aforesaid since July, 1917, the sum of not less than \$3,464.25."

It will be seen that the claim of the city of Cincinnati is based largely upon the construction of the lease executed and delivered to it by the governor of the state of Ohio on August 29, 1912, which lease was dated from October 1, 1912, for the term of 99 years, renewable forever, and was executed under the authority of an act of the general assembly of Ohio, found in 102 O. L., 168-171, entitled "An act to provide for leasing a part of the Miami and Erie canal to the city of Cincinnati as a public street or boulevard, and for sewerage and subway purposes."

The plaintiff in error, city of Cincinnati, bases its strongest argument for its rights in the matter upon the terms of the lease, urging that a fair interpretation of the lease gives it the right to the rentals for the use of that section of the canal leased to it. We are of opinion that the rights of the parties must be determined from the act itself, authorizing the lease, and that no rights accrue under the terms of the lease which are not duly authorized by the act.

In the case of *Roseberry v. Hollister*, 4 Ohio St., 297, the court say at page 308:

"The state can only act by its agents, duly authorized by law; and where such agents, being mere ministerial officers, transcend their authority, their acts are void, or at least voidable by the state."

Again in the case of *State v. Cincinnati Central Ry.*, 37 Ohio St., 157, the court say at page 178:

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"It is for the legislature, and not its subordinate agents, \* \* \* to authorize such additional public use and to confer such authority."

Without determining whether or not the lease contains any power or authority not contemplated by the act, it is clear that if it does it would be but a transcending of authority on the part of the state's agents, and would be without effect in so far as it exceeded the authority granted by the act. The act, under which the lease was made, is as follows:

"An act to provide for leasing a part of the Miami and Erie canal to the city of Cincinnati as a public street or boulevard and for sewerage and subway purposes.

*"Be it enacted by the General Assembly of the State of Ohio:*

"Section 1. Permission shall be given to the city of Cincinnati, in the manner hereinafter provided, to enter upon, improve and occupy forever, as a public street or boulevard, and for sewerage, conduit and if desired for subway purposes, all of that part of the Miami and Erie canal which extends from a point three hundred feet north of Mitchell avenue to the east side of Broadway in said city, including the width thereof, as owned or held by the state, but such permission shall be granted subject to all outstanding rights or claims, if any, with which it may conflict, and upon the further terms and conditions of this act.

"Section 2. Such permission shall be granted upon the further condition that said city, in the uses aforesaid of all or any portion herein mentioned of such canal, shall construct or cause to be constructed suitable and sufficient works for a convenient outlet for the discharge of the water of said canal, at a point three hundred feet north of Mitchell avenue, so as not to obstruct the flow of water through the remaining part of such canal, nor destroy nor injure the present supply of water for mechanical or commercial purposes. Such outlet shall be constructed in accordance with plans and specifications to be drawn or approved by the state engineer, and the city of Cincinnati shall give bond in such sum as shall be prescribed by the state board of public works, to be approved by the attorney general for the faithful performance of the work.

"And such permission shall be granted upon the further

condition that said city shall adopt and construct appropriate works for the purpose of supplying water to the lessee users of said water along that portion of the canal to be abandoned in order to and for the purpose of enabling the state fully to carry out and discharge the obligations now resting upon it by virtue of certain contracts now subsisting and in force between it and said lessee water users, during the remainder of the terms of said contracts, in the same quantity and under the same conditions and at the same rate of rental provided for in said contracts, and provided further that during the period of construction of a street or subway or of appropriate works for the purpose of supplying water to the lessee users of said water, as herein provided, said city of Cincinnati shall cause no cessation or diminution of the supply of water to the said lessee water users to which they are entitled under their respective contracts or leases with the state of Ohio, except in so far as such cessation or diminution of such supply of water may be absolutely necessary.

“Section 3. Upon the passage of this act the governor shall appoint three (3) arbitrators, none of whom shall be residents of Hamilton county, who shall, whenever the council of said city decided that such canal be used for all the purposes mentioned in section one (1) hereof, proceed to act as provided in section four (4) of this act.

“Section 4. The arbitrators thus selected shall constitute a board of arbitration whose duty it shall be, without reasonable delay, to ascertain and fix the actual value of the property of the state specified in section one hereof. The annual rental to be paid by the city of Cincinnati to the state for the use of such property shall be a sum equal to four (4) per cent. of such valuation so ascertained and fixed. Such board of arbitrators shall report the valuation as above provided for in writing to the governor and the council of such city respectively. And such board of arbitration shall have authority to hear the testimony of witnesses as to the fair value of such canal so to be taken by said city, to employ such assistants as it may deem necessary, and to fix their compensation, and to incur the expenses incident to its work. Each arbitrator shall receive for his services not exceeding twenty-five dollars a day for the period of time actually employed in the work of acting as arbitrator on such board; and all such expenses and such compensation shall be paid by said city, one-half of the amount so paid to be a credit upon the first installment of rent payable under the lease that may be entered into pursuant to this

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act. In case of any vacancy occurring in such board from any cause, such vacancy shall be filled in the same manner in which the appointment so becoming vacant was made. Provided that all rentals accruing to the state under this act shall be paid into the state treasury to the credit of the general revenue fund.

"Section 5. Upon approval by resolution of the council of said city of the amount of such valuation as fixed by such board of arbitration or a majority of them, and upon the governor being satisfied that the interests of the state are fully protected and that the valuation placed upon such property is adequate, which fact shall be endorsed upon such lease by the governor, he shall execute and deliver to the city of Cincinnati a lease for ninety-nine years, renewable forever, which lease shall not be assignable, of such canal so to be taken by the said city of Cincinnati for the uses and purposes before mentioned, and upon the terms and conditions specified in this act; and such lease shall contain covenants on the part of said city for payment of said rental to the state in equal semi-annual payments during such term of such lease, and for compliance with this act, and on the part of the state for quiet enjoyment by said city of Cincinnati of the demised premises, and the attorney general shall prepare such lease, and such lease shall contain the further provision that if said city of Cincinnati fails, neglects or refuses to perform all or any of the terms and conditions of said lease or fails, neglects or refuses to comply with each and every one of the terms and provisions of this act, the said lease shall become null and void and said city and the users and occupiers of said property shall forfeit all rights in said lease and in the property located upon the land therein described and such other covenants and provisions as, in the judgment of the attorney general, will protect the interests of the state.

"In case the state of Ohio shall at any time build a canal of not less than nine-foot gauge from Lake Erie to the Ohio river at Cincinnati, the city of Cincinnati shall reimburse the state for the amount of its expenditure in procuring right of way either by purchase or condemnation, or both, for said canal, from a point three hundred feet north of Mitchell avenue, through the Mill Creek valley, to the Ohio river.

"Section 6. The surface of such street or boulevard when completed shall not be occupied or used for the purpose of any street, steam, electric, elevated or other kind of railroad whatsoever, nor shall any rights by way of appropriation be exer-

cised or permitted as against such property; but nothing herein shall prevent the construction by said city or its grantee, of a subway beneath such street or boulevard, for use of a street, electric, suburban or interurban railway; provided, however, that the right to construct such subway or to use the same when constructed for any street, electric, suburban or interurban railway thereunder, shall never be granted or permitted to any person, persons or corporation other than said city, except on terms that shall provide for competitive bidding for the right to construct or use the same as aforesaid and on terms that shall secure to street, electric, suburban, interurban or underground electric railways the right to use the subway, all tracks, appliances, services and electric current in and incident thereto, on equal and proportionate terms, said terms to be determined on the basis of the total cost of operation and a reasonable return on the investment; provided further, that any street, electric, suburban or interurban railway using such subway shall permit the use of its tracks by any other electric, suburban or interurban railway for a reasonable compensation for such distance as is necessary to secure entrance to such subway, and provided further that should a gauge other than standard guage be established for the tracks of said subway, a standard guage shall likewise be provided for the tracks therein and for such tracks as are necessary to secure entrance thereto.

"Any grant or franchise made to any person, firm or corporation to construct or operate a subway under the property mentioned in section one hereof, shall be subject to all the provisions of Sections 9147, 9148 and 9149 of the General Code relating to underground railroads."

"Section 7. All laws and parts of laws inconsistent herewith are hereby repealed.

Section 8. If any section or portion of this act shall for any reason be declared to be unconstitutional, such invalidity shall not affect any other section or portion hereof."

Section 1 of the act provides that permission shall be given to the city of Cincinnati in the manner hereinafter provided to enter upon, improve and occupy forever, as a public street or boulevard, and for sewerage, conduit, and, if so desired, for subway purposes, that section of the canal described in the act and in the lease itself. Section 1 further provides that such permission shall be granted subject to all outstanding rights or claims,

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if any, with which it may conflict, and upon the further terms and conditions of the act.

A careful reading of the act shows clearly that some of its provisions look to the rights and interests of the state, such as the saving of the revenues, and the flow of the water from above the section leased through the sewers or outlet to be provided for by the city. None of these reservations or conditions contemplates the future use by the state of that part of the canal leased for the purpose of navigation—but do contemplate regulation for the purpose of giving a free flow from above and furnishing a supply to the users along the canal. This grant *and the construction by the city of the improvement authorized* would render it impossible to use the section of the canal leased for the purpose of navigation, and would be an abandonment for such purpose by the state of its incidental powers to sell the surplus water, or for navigation purposes, unless expressly saved by the reservations and conditions of the act.

Section 2 of the act provides:

"Section 2. Such permission shall be granted upon the further condition that said city, in the uses aforesaid of all or any portion herein mentioned of such canal, shall construct or cause to be constructed suitable and sufficient works for a convenient outlet for the discharge of the water of said canal, at a point three hundred feet north of Mitchell avenue, so as not to obstruct the flow of water through the remaining part of such canal, nor destroy nor injure the present supply of water for mechanical or commercial purposes. Such outlet shall be constructed in accordance with plans and specifications to be drawn or approved by the state engineer, and the city of Cincinnati shall give bond in such sum as shall be prescribed by the state board of public works, to be approved by the attorney general for the faithful performance of the work.

"And such permission shall be granted upon the further condition that said city shall adopt and construct appropriate works for the purpose of supplying water to the lessee users of said water along that portion of the canal to be abandoned, in order to and for the purpose of enabling the state fully to carry out and discharge the obligations now resting upon it by virtue of certain contracts now subsisting and in force between it and said lessee water users, during the remainder of the term of said con-

tracts, in the same quantity and under the same conditions and at the same rate of rental provided for in said contracts, and provided further that during the period of construction of a street or subway or of appropriate works for the purpose of supplying water to the lessee users of said water, as herein provided, said city of Cincinnati shall cause no cessation or diminution of the supply of water to the said lessee water users to which they are entitled under their respective contracts or leases with the state of Ohio except insofar as such cessation or diminution of such supply of water may be absolutely necessary."

The only right granted to the city under the act and the lease executed by the governor pursuant thereto was an easement, the fee title to the lands remaining in the state, subject only to the use by the city for the purposes named in the act. The grant was a right to occupy and improve as a public street or boulevard, and for sewerage, conduit and subway purposes, the section of the canal described, the fee remaining in the state. No other state's right or interest was granted or intended to be granted than that just recited.

In the case of *State v. Pittsburgh, C., C., & St. L. Ry.*, 53 Ohio St., 189, the fourth proposition of the syllabus is as follows:

"By the act of March 24, 1863, 60 O. L., and the conveyance afterwards executed by the governor pursuant thereto, the only right granted to the city of Cincinnati was to enter upon, improve and occupy the land described therein forever as a public highway and for sewerage purposes, the title to the lands remaining in the state subjected only to such use."

It is true that in the case of *Little Miami Elevator Co. v. Cincinnati*, 30 Ohio St., 629, the court held that the permission granted to the city to enter upon, improve and occupy forever as a public highway and for sewerage purposes was an abandonment of that part of the canal as a canal, and that such improvement and new use of it by the city rendered impossible any future use of it as a canal, and that if any future use was reserved such reservation would be inconsistent with the grant. It will be noted that the proposition there was that the improvement and new use were inconsistent with the grant, and the fifth proposition of the syllabus of that case holds:

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"This grant and the construction by the city of an avenue and sewer along the line of the land, upon a plan of improvement, approved by the board of public works, in such manner that the canal could no longer be used for purposes of navigation was an abandonment of it by the state for the public uses for which it was held."

The grant alone does not constitute an abandonment of the section of the canal granted. There must be the construction by the city of the improvements contemplated by the act, and, until said improvements are constructed, there is nothing inconsistent with the use by the state of the section granted for the purposes of navigation or the furnishing of a water supply. Further, we are of the opinion that the construction of a suitable outlet, as provided by the act, and the giving of a bond, as therein provided, constitute conditions precedent to the taking possession of the section of the canal leased, to the exclusion of the state from the uses to which it was entitled as a public highway.

In the case of *State v. George*, 34 Ohio St., 657. the court say in the first paragraph of the syllabus:

"The execution and delivery of the bond required by the act of April 6, 1876 (73 O. L., 275), and the supplementary act of April 24, 1877 (74 O. L., 466), are conditions precedent to the right to exercise the powers which said act were designed to confer."

That was a grant to the city of Hamilton to fill up the canal basin, and the act required the execution of a bond, and the court held, as above stated, that the execution and delivery of the bond was a condition precedent to the right to exercise the powers conferred. In that case the act did not in terms provided that the deposit of the bond with the governor should precede the exercise by the city of the authority to fill up the basin. The court held that the deposit of the bond as a condition precedent was intended by the act.

In the instant case the act provides that such permission should be granted upon certain conditions, to-wit: The construction of the outlet for the discharge of the water from above, approved

by the state engineer of the plans and specifications therefor, the execution of a bond, and further, upon conditions as to the protection of the supply of water to lessees. The agreed statement of facts shows none of these conditions to have been performed by the city. It is claimed by the city of Cincinnati that it has paid full rental value during the period covered by the lease, and that this alone gives it the right claimed. The answer to that is that the city possessed the right to proceed at once, upon the taking effect of the lease, to do the things provided in the act and to perform the conditions required. It may be stated further that the rentals had been paid in the case of *State v. George, supra*; but the court did not consider that in passing upon the case.

The authorities are uniform that both the execution of the grant and the construction of the improvement by the city must take place before the abandonment is complete. We therefore hold that the city acquired no right to rentals for navigation, having failed to perform the conditions precedent required under Section 2 of the act; that the use by the state as a highway for navigation purposes, until the improvement is made by the city, is not inconsistent with the grant; and that the state of Ohio is entitled to the money in question.

SHOHL and CUSHING, JJ., concur.

**CONSTRUCTION OF A TRUST DEED.****Court of Appeals for Pickaway County.**

**Allread, Fernalding and Kunkle, Judges of the Second Judicial District,  
sitting by designation.**

**Pierson, Trustee, v. Mitchell, et al.**

Decided, March 31, 1920.

*Trust Deed Conveys and Equitable Estate to the Beneficiary, When—  
Power to Remove Trustee—Jurisdiction to Require an Accounting.*

1. A deed for certain lands to "a trustee, his successor, heirs, and assigns forever," to manage and control the land conveyed for a certain beneficiary, to pay the beneficiary the net rents and profits and such part of the principal sum as said beneficiary may from time to time desire to use, with power to sell or mortgage for such purpose, conveys an equitable estate in fee to the beneficiary.
2. The probate court has power to remove the said trustee and appoint his successor.
3. A clause in the deed that the trustee "shall not be required to render any account of his trusteeship to any court but a settlement between the parties shall be final and conclusive," does not supersede the jurisdiction of the probate court over the accounting in case no settlement has been made between the parties.

*I. N. Abernathy, for plaintiff.*

*Milt Morris and Barton Walters for heirs of David H. Dennis.*

*Fred P. Griner, for Eli A. Leist, mortgagee.*

*Charles Dresbach, for the children of Sarah Jane Mitchell.*

*H. B. Weaver, for Wm. Taylor Dennis and Samantha Hill.*

**ALLREAD, J.**

Heard on appeal.

The rights of all parties are founded upon a deed executed on January 13, 1905, by David H. Dennis to David G. Dennis, trustee for Sarah Jane Mitchell. David H. Dennis at the date of the execution of said deed was 79 years of age, and had six

children, one of whom was Sarah Jane Mitchell. There were contemporaneous and prior deeds to other children, but we think the deed in question may be construed by its four corners.

The consideration was "\$1.00 and other valuable considerations paid by David G. Dennis, Trustee for Sarah Jane Mitchell."

The granting clause was "Unto the said David G. Dennis, Trustee for Sarah Jane Mitchell, his successors, heirs and assigns forever."

The habendum clause was "Unto the said David G. Dennis, Trustee for Sarah Jane Mitchell, his successors, heirs and assigns forever."

The warranty clause was "Unto the said David G. Dennis, Trustee for Sarah Jane Mitchell, his successors, heirs and assigns except a mortgage of \$3,000.00, of which the said David G. Dennis, Trustee for Sarah Jane Mitchell, assumes and agrees to pay \$400.00 thereof as the consideration."

The deed also contains the following recital:

"The said David G. Dennis is to manage and control the said lands as trustee for said Sarah Jane Mitchell, and is to pay to the said Sarah Jane Mitchell the net rent and profits thereof and such part of the principal sum as she may from time to time desire to use, and for this purpose, the said trustee is hereby authorized to sell or encumber by mortgage, the whole or any part of said land, as he may, in his judgment, deem best, and he shall not be required to render any account of his trusteeship to any court, but a settlement between said parties shall be final and conclusive."

The said David G. Dennis accepted the said trust and performed the duties thereof until about April 7, 1909, when he was removed by the probate court of Pickaway county and Frank T. Schleich was appointed as his successor. On April 14, 1913, Schleich resigned and Robert Pherson was appointed his successor.

David H. Dennis, the grantor, died July 24, 1907. Sarah Jane Mitchell, the beneficiary of the deed, died July 10, 1918, leaving children.

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During the administration of the trust certain mortgages were executed by the trustee upon the real estate described in the deed and the consideration thereof was received by Sarah Jane Mitchell.

There are also certain debts and expenses outstanding against the estate of Sarah Jane Mitchell.

The controlling questions relate, first, to the jurisdiction of the probate court to remove the original trustee named in the deed and appoint his successor; second, to the construction of the deed and the interest conveyed thereby.

We think under Sec. 11029 G. C., *et seq.*, the probate court had jurisdiction to remove the trustee named in the deed and appoint his successor.

It is true that the trust created by the deed expressly provided that the trustee should not be required to render any account of his trusteeship to any court and that a settlement between said parties should be final and conclusive. Nevertheless, in the absence of a settlement between the parties, the probate court would be the appropriate forum to exercise jurisdiction over the trust, and, by clear implication, if not by express authority, the probate court would have jurisdiction to remove the trustee and appoint his successor.

We think it clear that David G. Dennis, the trustee named in the deed, took no interest under the deed except as trustee for Sarah Jane Mitchell. The grant to him, his successors and heirs and assigns was not intended to create a personal interest, but only to facilitate the execution of the trust.

David G. Dennis having no individual interest in the title, his removal and the appointment of his successor would *ipso facto* vest the equitable title to the land, together with the duties and responsibility of the trust, in his successor.

The question which has given us most concern is between the claim of the heirs of David H. Dennis and the claim of the heirs of Sarah Jane Mitchell. Counsel for the heirs of David H. Dennis rely upon the case of *Broadup v. Woodman*, 27 Ohio St. 553.

We think, however, there is a vital distinction between the

trust created in the *Broadup case* and the one in the case at bar. Woodman was the trustee in the case cited, and the terms of his trust were stated in a certain answer filed in a former case. According to the admissions of said answer Woodman's trust was limited to the payment of certain debts of the grantor and provision for the support and maintenance of grantor's wife and the support, maintenance and education of his child. It was held that after full performance of the trust the remainder reverted to the grantor's heirs. The trust in the case at bar is not limited as in the *Broadup case*. The title is granted in the broadest possible terms to the said trustee of Sarah Jane Mitchell. The terms of the trust required the said trustee to manage and control the said land as trustee for the said Sarah Jane Mitchell and to pay her "the net rents or profits and such part of the principal sum as she may from time to time desire to use." "Such part" would include the whole and would give its beneficiary the right to receive it in partial payments or installments.

Sarah Jane Mitchell was not only made beneficiary of the legal title, but the terms of the trust place the income as well as the principal absolutely at her disposal. The trustee's authority was confined to the management and control of the land for her benefit with the right to sell or encumber the property in the management of the trust. The trustee in the management and control of the land was invested with authority to make repairs and also such improvements as were necessary and proper. Whether the expenditures made were proper should be determined by the probate court. We are, therefore, led to the conclusion that Sarah Jane Mitchell became the equitable owner in fee of the real estate and that subject to the execution of the trust and the payment of valid encumbrances and debts the interest in said real estate and the proceeds thereof passed upon her death to her heirs.

The deed will be so construed. The details of accounting will be left to the probate court.

FERNEDING and KUNKLE, JJ., concur.

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**QUESTION AS TO WHETHER A CONTRACT WAS BREACHED.**

Court of Appeals for Hamilton County.

**MAL-GRA CASTINGS Co. v. NATIONAL BRASS MANUFACTURING COMPANY.**

Decided, March 15, 1920.

*Contracts—Purchase of a Fixed Amount of Castings at a Specified Rate—No Stipulation as to Manner or Time of Payment—Effect of War Conditions, Railway Congestion and Failure to Pay One Installment Become Questions for the Jury.*

Plaintiff and defendant entered into a contract whereby defendant was to make for plaintiff 400,000 specified castings at nine cents per pound, f. o. b., deliveries to be made as early as possible after January 2, 1917, nothing being said as to manner or time of payment. Defendant began deliveries of the castings which were accepted and paid for by plaintiff. The last installment, the value of which was \$20.82, was delivered by defendant to the carrier March 20, 1917, but never received or paid for by the plaintiff. Plaintiff later complained of nondelivery of the remaining installments and demanded immediate delivery, whereupon defendant replied that it would be unable to make any deliveries before January 1, 1918. In an action by plaintiff for breach of contract, *Held*:

1. By the language of the contract and conduct of the parties it was the intention to make deliveries by installments, and by virtue of Section 8422, General Code, delivery and payment are concurrent. Under paragraph 2, Section 8425, General Code, whether the failure to make payment for the last installment was such a breach as to justify defendant to refuse to proceed further is a mixed question of law and fact to be submitted to the jury under proper instructions.
2. Defendant having denied a breach on its part, and alleged its willingness to proceed with deliveries under the contract, it was error for the court to charge as a matter of law that the statement of the defendant that it could not resume deliveries before January 1, 1918, was a breach of the contract by the defendant.
3. Under Section 8423, General Code, the question whether the offer to deliver January 1, 1918, was an unreasonable time under the terms of the contract was for the jury.

4. What is reasonable time must be considered in the light of the surrounding circumstances, and it was error for the court to exclude evidence offered by defendant tending to show that after March, 1917, war conditions made it impossible to get necessary labor and materials; that defendant was hampered by shipping conditions; that the plant which furnished defendant power broke down; and that strikes and wages interfered with shipments.

*Andrews & Andrews* and *Ben B. Nelson*, for plaintiff in error.

*Hunt, Bennett & Utter*, for defendant in error.

**HAMILTON, J.**

Heard on error.

The petition in error seeks to reverse a judgment obtained in the court of common pleas of Hamilton county, Ohio, claiming as ground for reversal error in giving the special charges requested by defendant in error, error in the general charge to the jury, error in the exclusion of evidence offered by plaintiff in error, and that the verdict and judgment are against the weight of the evidence and not sustained by sufficient evidence.

The case was heard on the amended petition, the answer thereto, and the reply. The action was one for breach of contract.

The plaintiff below, The National Brass Manufacturing Co., entered into a contract with the defendant, The Mal-Gra Castings Co., under which the defendant agreed to make for plaintiff 100,000, No. 16, and 300,000, No. 81, foot castings, at a price of nine cents per pound f. o. b. Cambridge City, Indiana. The contract provided that deliveries were to be made as early as possible after January 2, 1917.

It is claimed that of the amount of castings contracted for, the defendant has only delivered to the plaintiff 9,414 pieces, and that the defendant now refuses to make further delivery of any castings whatsoever, although demand therefor has been made by the plaintiff. The plaintiff alleged it had duly performed all the conditions on its part to be performed, and asked damages.

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The answer admitted the contract and the amount delivered, but denied each and every other allegation in the amended petition, and averred that defendant had been ready and willing to manufacture the other castings, undelivered; that plaintiff refused to pay for a consignment of castings; and that defendant thereupon declined to make further castings until the amount owing was paid. The answer further alleged that subsequent to the refusal to pay, although defendant was willing and is now willing to manufacture the balance of the castings, pursuant to the contract, the plaintiff withdrew from the defendant all patterns necessary for the manufacture of the castings, and that by reason thereof the defendant was prevented from completing their manufacture, although it was ready and willing to do so. Defendant claimed a breach of the contract on the part of the plaintiff. To this answer the plaintiff filed a general denial.

The following is a copy of the contract involved in the case:

November 25th, 1916.

MAL-GRA CASTINGS Co.,  
Cambridge City, Indiana.

GENTLEMEN:—

We hereby confirm order given Messrs. Moesta and Ruehrwein  
a few days ago for:—

100,000      No. 16 feet castings.

300,000      No. 81 feet castings.

Price: \$.09 per pound F. O. B. Cambridge City, Ind.

All gates to be ground.

Deliveries to be made as early as possible after January  
2nd, 1917.

We also reserve the right to return defective castings to you  
monthly.

Yours respectfully,

THE NATIONAL BRASS MFG. CO.

Per S. M. Lawson.

Accepted:—

THE MAL-GRA CASTINGS Co.,  
Per J. W. Brown, Sec.

It appears that the castings company, pursuant to the contract, began delivery of castings in installments, which were

accepted and paid for by the brass company. The last installment of the amount admitted to have been delivered was delivered to the carrier at Cambridge City, Indiana, on March 20, 1917, and the invoice therefor sent to the brass company. No further deliveries were made after this date. It appears that the brass company did not receive this last installment, the value of which as shown by the invoice was \$20.82. At the request of the castings company the invoice was returned, and they undertook to trace the shipment from Cambridge City, the place where the shipment was delivered to the carrier. Nothing further was done by the castings company with reference to the deliveries of the goods contracted for, although shipments were urged by the brass company.

It appears that on August 13, 1917, the brass company wrote a letter, which is in evidence, to the castings company, complaining of nondelivery and demanding immediate delivery. On August 16 the castings company replied to that letter stating that it would not be able to make any deliveries until January 1, following. The brass company thereupon went into the market and purchased the castings elsewhere, and, on September 17, 1917, filed this action in the court below for damages for breach of contract by the castings company.

On September 29 the castings company wrote the brass company calling their attention to the unpaid installment of \$20.82, stating that they were ready to commence immediate deliveries, but refusing to do so until the unpaid installment of money was paid. Without paying the installment, the brass company withdrew its patterns from the castings company.

At the close of all the evidence counsel for the defendant castings company moved the court to direct the jury to return a verdict for the defendant, and for judgment in its favor, which motions the court overruled. The plaintiff did not move for judgment, nor for a directed verdict. The matter was thereupon submitted to the jury.

Plaintiff, before argument, requested the following special charges:

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"No. 1. The fact that the plaintiff, the National Brass Manufacturing Company, did not pay for one of the shipments of castings made by the defendant, The Mal-Gra Castings Company, did not excuse the Mal-Gra Castings Company from performing their agreement to make the castings called for by the contract."

"No. 2. The refusal on August 16th, 1917, by the defendant, The Mal-Gra Castings Company to make any further deliveries upon their contract with the plaintiff, The National Brass Manufacturing Company before January 1, 1918, was the breaking by the Mal-Gra Castings Company of the contract between the plaintiff and defendant."

Both of these charges were given as requested, over the objection of defendant, and exception taken thereto.

The giving of these special charges presents a question as to whether or not the failure to pay for the installment of March 20, 1917, and the refusal to make further deliveries before January 1, 1918, as stated in the letter of the castings company of August 16, 1917, were questions of law for the court or questions of fact for the jury.

It is urged by counsel for defendant in error that the non-payment of \$20.82, the small installment of March 20, being such a paltry sum in consideration of the entire amount involved, would not constitute a breach. While it is true that the law does not regard trifles (*Hallet & Davis Piano Co. v. Starr Piano Co.*, 85 Ohio St., 196, the amount in question, although small, is the invoice price of one whole installment. Section 8425 G. C. (Sales Act), paragraph 2, provides:

"When \* \* \* the buyer neglects or refuses to make delivery of or pay for one or more installments, it depends in each case on the terms of the contract and the circumstances of the case, whether the breach of contract is so material as to justify the injured party in refusing to proceed further."

There is no time fixed by the contract for the payment of the goods. Section 8422 G. C., provides:

"Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions."

Delivery in installments had been made and accepted by the brass company, and they had made payments therefor on the installments invoices. The language of the contract and the conduct of the parties thereunder indicated clearly that it was the intention to make delivery in installments, and, under the provision of Sec. 8422, "delivery and payment were concurrent." Failure to make the payment for the installment, therefore, brings this question under Sec. 8425, paragraph 2. Whether or not the nonpayment is such a breach of the contract, or is so material as to justify the castings company in refusing to proceed further, depends on the terms of the contract and the circumstances of the case. This presents a mixed question of law and fact, and the facts and circumstances should have been left to the jury, under proper instructions of the court.

In the second special charge of plaintiff, above quoted, the court, in effect, charged as a matter of law that the statement of the castings company that it could not begin deliveries before January 1, 1918, was the breaking of the contract by the castings company. This was error. In the amended petition, plaintiff alleged a breach of contract which was met by way of general denial by the defendant, and defendant further alleged its willingness to proceed with the deliveries under the contract. This directly raised the question as to whether or not deliveries to begin January 1, 1918, were within a reasonable time under the terms of the contract, no time for completion having been specified. Section 8423 G. C., paragraph 2, provides:

"When by a contract to sell or a sale the seller is bound to send the goods to the buyer, but no time for sending them is fixed, the seller is bound to send them within a reasonable time."

Paragraph 4 provides:

"Demand or tender of delivery may be treated as ineffectual unless made at a reasonable hour. What is a reasonable hour is a question of fact."

It is conceded that what is a reasonable time is a question of fact for the jury, but it is urged by the defendant in error

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that the allegation in the answer did not raise the question. As we have above observed, the question is made by the general denial of the breach. While it is the law that if a breach is admitted, facts to relieve against a breach must be pleaded, that is not the question here. The breach itself is denied and the willingness to perform is alleged, and, under the law and Sec. 8423 G. C., the fact as to whether the offer to deliver January 1, 1918, was or was not an unreasonable time was a question for the jury. If the time was unreasonable, the letter would constitute an anticipatory breach.

In its general charge, the court charged the jury that the only question for the jury to consider was the amount of damage. In view of our holding, on the question of the submission of plaintiff's special charges, Nos. 1 and 2, it becomes apparent that this was error. The court should have submitted to the jury the question of reasonable time and whether or not under all the circumstances of the case the failure to pay the installment of \$20.82 was a material breach.

The defendant proffered evidence tending to show that after March, 1917, owing to war conditions, it was impossible to obtain necessary labor and material, and that it was hampered and inconvenienced by shipping conditions; that the electric light plant of Cambridge City, which furnished the defendant with power, broke down, which made it impossible to operate the foundry, that the town was small and the labor market limited, and that questions arose involving strikes and wages of the laborers, all of which interfered with deliveries. The trial court refused to admit this evidence, and this refusal is urged as a ground of error.

We are of opinion that it was error to exclude this evidence. In view of the general denial of the allegations of the petition, to entitle it to recover, the plaintiff was bound to establish the breach by showing nonperformance within a reasonable time. The defendant was thereupon entitled to introduce any evidence which tended to controvert that fact.

The time that is reasonable for performance means reasonable in view of all the existing facts and circumstances, ordinary

and extraordinary, legitimately bearing upon that question at the time of performance. Time that is reasonable under ordinary circumstances may be unreasonable under extraordinary circumstances, or conversely, and applying to the instant case, extraordinary circumstances may make a time of performance reasonable which under ordinary circumstances would be unreasonable. *Empire Transportation Co. v. Philadelphia & Reading Coal & Iron Co.*, 77 Fed. 919, [35 L. R. A. 623]; *Corrigan v. Iroquois Furnace Co.*, 100 Fed. 870; *Acme Transit Co. v. 133,000 Bushels of Wheat*, 243 Fed. 970; *Eppens, Smith & Wiemann Co. v. Littlejohn*, 164 N. Y., 187 [58 N. E. 19; 52 L. R. A. 811], and *Richland S. S. Co. v. Buffalo Dry Dock Co.*, 254 Fed. 668.

The evidence proffered would tend to show extraordinary circumstances arising during the time of performance, and what was reasonable time must be considered in the light of these surrounding circumstances.

The evidence was admissible as bearing on the question of reasonable time, and the defendant was entitled to have the consideration of the jury upon this evidence.

For the errors above stated the judgment will be reversed and the cause remanded for a new trial.

SHOHL and CUSHING, JJ., concur.

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**Cuyahoga County.**

**LIABILITY FOR INJURY TO MINOR INVITED TO ASSIST BY  
EMPLOYEE CONTRARY TO RULE.**

**Court of Appeals for Cuyahoga County.**

**THE DELIVERY CO. v. CALLACHAN, BY ETC.\***

**Decided, July 2, 1917.**

*Master and Servant—Contrary to Rule Truck Driver Invites Minor to Assist—Minor Injured—Employer Liable—Failure to Request Special Instruction to the Jury—Charge Limited by Answer, When.*

1. Where an employee of a company engaged in delivering special packages invites a minor to ride on the truck and deliver packages for him, promising to pay the minor for such services, and the minor is injured through the negligence of the employee, the company is liable for such injury, notwithstanding it had a rule that employees were to allow none other than authorized employees to be and remain on such trucks.
2. Error can not be predicated with reference to the failure of the court to charge with reference to one phase of a case in the absence of a request to charge with reference thereto.
3. Where the answer contains a general charge of contributory negligence followed by specifications of contributory negligence, the court should limit the jury in its consideration of contributory negligence to the question whether or not plaintiff was negligent in the particular charged in the answer.

*Gage, Day, Wilkin & Wachner, for plaintiff in error.*

*Chapman, Howland, Niman & Waite and Geo. C. Hafley, for defendant in error.*

**LIEGHLEY, J.**

Heard on error.

The parties stood in reverse order in the court below, and for convenience will be so named herein.

The plaintiff, Charles M. Callachan, a minor, filed his peti-

\*Motion to require the Court of Appeals to certify its record in this case overruled by the Supreme Court, October 9, 1917.

tion in the court below stating that he was a minor; that on the 29th day of October, 1915, he received certain personal injuries through the carelessness and negligence of the defendant, for which he prayed for damages; that the defendant company was engaged in the business of delivering packages for various concerns in the city of Cleveland by means of an automobile truck then and there in charge of one Stephan; that on the 26th day of October, 1915, the said Stephan was operating said truck in delivering packages at and near East 40th street and Payne avenue, where he met plaintiff and invited him on the truck and invited him to act as a "jumper" for him in delivering packages to customers, and promised to pay him for his services; that he did pay him; that this proceeding continued for four successive days, and that on the fourth day, through the carelessness and negligence of said Stephan in the operation of said auto truck, plaintiff was injured; that plaintiff was not an employee of the defendant company; and that said defendant company, through its agent and servant, Stephan, was negligent in the following particulars:

1. By said Stephan operating said automobile in such a manner as to cause the same to suddenly jerk and throw plaintiff therefrom.
2. By said Stephan failing to guide and control said automobile so as to avoid running against and over plaintiff's leg.
3. By said Stephan not stopping said automobile for plaintiff to alight therefrom.
4. By said Stephan ordering plaintiff to jump from said automobile while in motion.

Trial was had in the court below, which resulted in a verdict and judgment for plaintiff, from which judgment error is prosecuted in this court to reverse the same.

It is urged that the judgment is contrary to law. It is conceded that the doctrine announced in the case of *Cleveland, Terminal & Valley Rd. Co. v. Marsh*, 63 Ohio St., 236, is controlling, unless the fact that the defendant company promulgated a rule expressly instructing employees to permit none

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other than authorized employees to be and remain on the truck requires the above case to be distinguished from the case at bar.

Quoting from the syllabus in *Railroad Co. v. Marsh, supra*:

"3. One who is invited by a servant of a corporation in charge of its work or service to assist him therein, and does so with some purpose or benefit to be subserved in his own behalf in addition to the purpose of so assisting, is not a volunteer, and is entitled while so assisting, to be protected against the negligence of the servants of the company."

 Quoting from the opinion, at page 245:

"Where a person at the request of a servant of a corporation, assists such servant in the performance of his work without any purpose or benefit of his own to be served by such assistance, he is regarded as a mere volunteer, and the requests to charge would be applicable to such a case. But where he has a purpose or benefit of his own to be served by such assistance, in addition to the purpose of assisting the servant, he is regarded as acting in his own behalf, with at least acquiescence of the company. A trespasser who is upon the company's premises wrongfully, and a mere volunteer, stand upon substantially the same footing, and are entitled to recover only for such negligence as occurs after the servants of the company discover their perilous situation, that is for wilful or intentional injury. But there is a class between mere volunteers and trespassers and partaking somewhat of the characteristics of each, that is where the person assists the servant at his request, not only for the purpose of assisting in the work of the master, but also for a purpose and benefit of his own. In such cases it can not be said that he is wrongfully upon the premises, because he is invited by the servant in charge. The master may not have assented, but neither has he dissented, and being there upon the invitation of the servant in charge and there being no dissent of the master, he is regarded as being there by sufferance. And being there by sufferance he is rightfully there for the double purpose of aiding the servant, and thereby furthering the interests of the master, and of furthering his own private interests in his own behalf and for his own purposes and benefits. In such cases the person so assisting cannot be held to thereby become a servant of the master, because the servant inviting such assistance has no power or authority to employ other ser-

vants, and therefore the law of fellow-servants is not applicable. As such assistant is not a trespasser, and not a fellow-servant, and not a mere volunteer, the law assigns to him without name the position of one, who, being upon the premises of another by the sufferance of such other, performing labor or service for his own purpose and benefit in his own behalf, is entitled of right to be protected against the negligence of the owner of the premises or his servants. The case of *Street Railway Co. v. Bolton*, 43 Ohio St., 224, was decided upon this principle, although the principle is not very clearly stated in the report of the case."

It is claimed that the promulgation of the rule amounted to a dissent on the part of the defendant. The plaintiff claims that he was a "licensee with an interest" under the rule in the above case. Does the rule—of which the plaintiff knew nothing, so far as the record shows—have the effect of changing the status of the plaintiff from that of a licensee with an interest to that of a trespasser or volunteer? In this case it is conceded that the plaintiff was in the employ of Stephan, and while so employed both were engaged in furthering the business of the master. We know of no authority for the doctrine that the promulgation of a rule for the direction and control of employees will excuse the master for the tort of the servant which results in injury to a third person, relieving the master of responsibility therefor. It seems to us that the authorities are to the contrary.

In the case of *Harriman v. Railway Co.*, 45 Ohio St., 11, the court says, at page 38 of the opinion:

"So it may be said in this case, that at most it appears that the defendant's servants, while acting in its business and within the scope of their employment, deviated from the line of their duty to the defendant and disobeyed its instructions. Nevertheless, while so deviating and disregarding their instructions, they were still doing their employer's work, though not according to their instructions. And see *Quinn v. Power*, 87 N. Y. 535."

We quote from the syllabus in the case of *Barrett, Gdn. v. Railway Co.*, 106 Minn., 51, 18 L. R. A. (N. S.), 416:

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"A master is responsible for the torts of his servant, done in the course of his employment with a view to the furtherance of his master's business, and not for a purpose personal to himself, whether the same be done wilfully, but within the scope of his agency, or in excess of his authority, or contrary to the express instructions of the master."

In a note appended to the last-mentioned report are cited many authorities in support of this doctrine.

It is our opinion, therefore, that the judgment is not contrary to law under the doctrine announced in the *Marsh case* above referred to, and we are not disposed to depart from that doctrine, as urged upon us by counsel.

It is further urged that the judgment is against the weight of the evidence. We have examined the testimony of plaintiff and Stephan, the driver, and as we view it the circumstances developed by their testimony were such as to warrant the trial court in submitting the case to the jury. The jury resolved all the issues in favor of the plaintiff, and we think there is proof in the record to support that finding.

It is further claimed that the court erred in submitting to the jury the second, third and fourth specifications of negligence, respectively. From an examination of the proof we can not say that there was no evidence to support one or more of these specifications. Our disposition is that in the state of the record it is not material that some of the charges are not upheld by evidence, if others are, under the general principle announced in *Sites v. Haverstick et al.*, 23 Ohio St., 626; *Beecher v. Dunlap et al.*, 52 Ohio St., 64; *McAllister v. Hartzel*, 60 Ohio St., 59, and *State, ex rel. Lattanner, v. Hills*, 94 Ohio St., 171.

It is further claimed that the court erred in its failure to charge the jury as to the duty of the plaintiff in the event his own evidence raised a presumption of negligence. It was admitted that no request was submitted to the court to charge upon this subject, and in the absence of a request no prejudicial error can be successfully claimed for a failure so to do. *State v. Schiller*, 70 Ohio St., 1, 8, and *State v. McCoy*, 88 Ohio St., 447, 453.

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It is further urged that the court erred in its charge on the subject of contributory negligence. The answer of the defendant contains a general charge of contributory negligence, followed by a specification to the effect that the plaintiff jumped, etc. The court in its charge limited the jury in a consideration of contributory negligence to a determination of the question of whether or not the plaintiff was negligent in the particular charged in the answer. We think the court was right. *N.Y., C. & St. L. Rd. Co. v. Kistler*, 66 Ohio St., 326, 333.

It is further urged that the court erred in refusing to give defendant's request No. 7. This request required the jury to confine its deliberation upon the case to a consideration of specification of negligence No. 1. In the view we have of the case, as before stated, we think it would have been error in the court to have given the same.

We find no error in the record prejudicial to the rights of the defendant, and the judgment of the court below is affirmed, with costs assessed against plaintiff in error.

Judgment affirmed.

GRANT and CARPENTER, JJ., concur.

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#### **PROOF IN PROSECUTION FOR ARSON OF VALUE OF PROPERTY DESTROYED.**

Court of Appeals for Cuyahoga County.

**WEISENBERG v. STATE OF OHIO.**

Decided, January 23, 1920.

*Arson—Prosecution for—Certificate of Appraisers Incompetent as to Value of Property Destroyed.*

1. The actual value of insured property being important to show criminal intent necessary to establish the offense in a prosecution for arson on an indictment charging defendant with burning certain household goods with intent to prejudice the insurer, it is prejudicial error to prove the value of the property by the written certif-

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- cate of appraisers, not sworn as witnesses, to the effect that in their opinion the value was a certain amount.
2. If the certificate of appraisers was competent, secondary evidence of its contents was not admissible, without accounting for its absence, and proof of a diligent search to produce it at the trial.

*Rogers, Klein & Harris*, for plaintiff in error.

**SHOHL, P. J.**

Heard on error.

Plaintiff in error, Louis Weisenberg, was convicted of arson on an indictment charging him with burning certain household goods with intent to prejudice the insurer.

The defendant, accompanied by his brother-in-law, left his residence in Cleveland at about 2 P. M. on the day of the fire. He went to Massillon to attend a celebration, leaving Cleveland on the five-o'clock train. At 8:45 of that evening a fire broke out at the house in which he lived. It appeared that he had a policy of insurance in the sum of \$500, and after the fire, he made a claim against the company for the full amount thereof, filing proof of loss aggregating \$656.50. The prosecution contended that the value of the insured property was less than \$500, and that the actual loss was under \$300. These elements were important to show the criminal intent necessary to establish the offense. It was proved in the following manner:

At the trial one Frank C. Carroll, a fire insurance adjuster, testified, over the objection of defendant, that an award had been made by appraisers stating that in their judgment the actual loss was \$287.50, and that the value of the property before the fire was \$400. The award itself was not produced and the witness stated that to the best of his recollection it was in the hands of the attorney for the insurance company at Columbus.

The admission of the foregoing testimony constituted prejudicial error. It was not proper to prove the value of the goods by the written certificate of some person not sworn as a witness, to the effect that in his opinion the value was a cer-

tain amount. Such evidence is mere heresay and subject to all the infirmities thereof.

It is a fundamental principle that in a criminal prosecution the accused has not only the right to be heard by himself or counsel, but to meet the witnesses face to face, and to require the testimony against him to be under the sanction of an oath: and the witnesses must be subject to proper cross-examination. The admission of the contents of the certificate of award was in substance granting the state the benefit of the testimony of the appraisers without giving the accused the foregoing rights. 1 Greenleaf, Evidence (16 ed.), Secs. 99 and 99A; *Farrington v. State*, 10 Ohio, 354, and *Hanley v. State*, 12 C. C. 584; 5 Cir. Dec., 488.

But, even if the certificate was competent, secondary evidence of its contents was not admissible, without accounting for its absence and without proof that reasonable diligence had been exercised to secure its production at the trial. See *Simpson & Co., v. Dall*, 70 U. S. (3 Wall), 460, 475; *Brown v. Harkins*, 131 Fed. 63; *Kearney v. New York (Mayor)*, 92 N. Y., 617; 1 Greenleaf, Evidence (16 ed.), Sec. 563B; *Clark v. Longworth*, Wright, 189, and *Cochran v. State*, 25 C. C. (N. S.), 430.

If the document was in the hands of the insurance company at Columbus, the state had power to produce it.

In view of the foregoing it will not be necessary to consider the weight or sufficiency of the evidence.

The judgment will be reversed.

HAMILTON and CUSHING, JJ., concur.

**FAILURE OF AN OFFICIAL TO PAY MONEY INTO THE TREASURY.**

Court of Appeals for Butler County.

THEISS V. THE STATE OF OHIO.\*

Decided, May 26, 1919.

*Embezzlement—Official Retains Public Money for Several Months—His Failure to Pay it into the County Treasury to be Considered as Bearing on the Question of Intent--Section 289.*

1. Intent is a necessary ingredient in the crime of embezzlement.
2. The holding of public money by an official and his failure to pay the same into the treasury every twenty-four hours, as required by Section 289, General Code, are facts to be considered by the jury as evidence of an intention to convert such money to his own use and thereby embezzle it; and under Section 13674, General Code, the failure to pay over such money constitutes *prima facie* evidence of its embezzlement.
3. On the trial of a public official whose duty it was to pay public funds received by him into the treasury each twenty-four hours, it is prejudicial error to charge the jury that the mere keeping of public money in such custodian's house for a period of time, thus depriving the county of the use of such money, would be a conversion thereof and constitute embezzlement under Section 12873, General Code.

*W. C. Shepherd and John B. Connaughton*, for plaintiff in error.

*Ben A. Bickley and Andrews & Andrews*, for defendant in error.

**CUSHING, J.**

Heard on error.

The indictment in this case charges that Jacob Theiss, being the superintendent of the infirmary of Butler county, Ohio, and

\* Motion to require the Court of Appeals to certify its record in this case overruled by the Supreme Court, November 11, 1919.

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being charged as such superintendent with the receipt of public money in the sum of \$903.80, belonging to said county, did unlawfully and fraudulently embezzle and convert to his own use said money, which had then and there come into the possession and custody of the said Jacob Theiss by virtue of his said office, employment and position, and in his discharge of the duties thereof, and so that the said Jacob Theiss is guilty in the manner aforesaid of the crime of embezzlement of public money, so as aforesaid by him converted and used.

The facts developed at the trial were that Theiss sold produce from the infirmary farm, of which he was superintendent, about October, 1917, collected the money for same, but had not paid it into the county treasury at the date of the indictment, May, 1918. Theiss admitted the sale of the produce and the collection of the money, but claimed and testified that on receipt of the money he turned it over to his wife for safekeeping; that she placed it in envelopes and locked them in a trunk in the house occupied by them on the infirmary farm; that he intended to pay the same into the treasury; that he did not loan, deposit or use the same; and that he at no time intended to use or appropriate it to his own use or deprive the county of the money. On these facts the court charged the jury:

"The court therefore says to you that if Jacob Theiss did sell products of the infirmary farm and did not pay the money into the treasury as the law requires, as I have pointed out to you, but on the other hand knowingly and purposely kept the money in his house from on or about October, 1917, until the date of this indictment in May, 1918, keeping it in his house in envelopes placed in a trunk therein, or keeping it elsewhere therein, that he had no lawful right to do so, and if he did so knowingly and purposely and wilfully and thus deprived the county of the use and benefit of said money during said period, that would be exercising dominion over that property in exclusion of the rights of the owner, which is Butler county. He would be exercising an act of dominion over that money inconsistent with the right of the owner, Butler county; he would be doing an unauthorized act depriving Butler county of said money for said time, and that would be a conversion on his part of the money so kept and held by him, and if that state of facts

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has been proved or admitted, then the state has proved this averment of the indictment, to-wit: that he did convert the money so kept and held by him. This is true even though he intended to finally pay it into the treasury of Butler county, and even though he be now ready and willing to pay it into the county treasury."

After the jury retired to consider the case, it returned and requested further instructions. The record shows the following:

The Foreman: "There is a question in the minds of some of the jurymen as to what constitutes intent."

The Court: "Can you make that question any clearer?"

The Foreman: "If Mr. Theiss held the money, whether he used it for his own personal expenditures, or for himself, or whether he simply kept it, the question arises did he do that with the intention of defrauding the county? That is the point."

The Court: "Now, Gentlemen, answering your question, if the state has proved beyond all reasonable doubt that the defendant knowingly, intentionally, and purposely used the money described in the indictment, or any part of it, for his own private use, that would be a conversion of it, and that would be embezzlement, provided the other elements of the crime are proved, even though he had no intent at the time to defraud the county out of the money.

"So I say to you further that if the State has proved beyond all reasonable doubt that the defendant knowingly, intentionally, and purposely, kept the money in his house from about October, we will say, until the date of this indictment, and thus deprived the county of the use of that money, that would be a conversion and embezzlement, even though he had at the time no intent to defraud the county out of the money, and intended to later on pay the money into the treasury, provided, of course, the other elements of the crime are proved.

"You may now retire, Gentlemen."

The indictment charges that Theiss embezzled and converted to his own use money belonging to the county. The court charged the jury when it returned for instructions that if he kept the money in his own house and deprived the county of the use of that money, that would be a conversion and embezzlement, even though he had at the time no intention to defraud

the county out of the money and intended to later on pay the money into the county treasury.

Section 289, General Code, requires the custodian of such funds to pay the same into the treasury each twenty-four hours. There is no penalty provided in this statute for failure to so do, neither does Section 12873 make it an offense to hold such public money.

Section 12873 specifies five acts which are defined as punishable offenses—embezzlement on the part of one charged with the collection, receipt, safe-keeping, and disbursement of such public money:

1. To convert to his own use.
2. To convert to the use of any other person, etc.
3. To use by way of investment, etc.
4. To loan with or without interest, etc.
5. To deposit with a company, etc.

In its charge, above quoted, the court instructed the jury that the keeping of the money in his house, thus depriving the county of the use of that money, would be a conversion and embezzlement. This was error.

In the case of *The State of Ohio v. Baxter*, 89 Ohio St., 269, Baxter took the money, used it to pay his own debt, and later put other money of equal value in its place. The conversion and embezzlement of the money was completed as soon as Baxter used it for his own purpose.

In *The State of Ohio v. Cameron et al.*, 91 Ohio St., 50, the court says, at page 56, referring to the *Baxter cases*

“We held that (1) the temporary appropriation of the public money by an officer to his own use, with the intention of restoring it, is a conversion within the meaning of that statute; (2) that he thereby violates that statute though he be not a defaulter, and (3) the return of the money will not expunge the guilt.”

In *The State of Ohio v. Gross*, 91 Ohio St., 161, the court uses this language at page 165:

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"It is sufficient to say, however, that there was ample evidence to go before the jury upon this issue of fact as to when the intention to appropriate was formed. Like the question of agency, the question of intent is purely a question of fact, with which the courts have nothing whatsoever to do in the trial of a criminal cause. Such questions are to be determined by juries."

A necessary ingredient in the crime of embezzlement is the intent or *animus furandi* to be determined by the jury.

"Still we may infer from the authorities, and from the reasons inherent in the question, that if the servant intentionally does with the property under his control what one must intend to do with property taken to commit larceny of it, he embezzles it, while nothing else is sufficient." *State v. Baxter, supra,* at 273.

Had the court instructed the jury that holding of the money by Theiss from October to May, and his failure to pay it into the treasury as required by law could be considered evidence of his intention to convert the money to his own use and thereby embezzle it, and that under Section 13674, General Code, the failure to pay over the money constituted *prima facie* evidence of its embezzlement, these things to be considered in connection with the fact that within the time stated he had collected and paid into the treasury other money collected by him, that would have left for the determination of the jury the question of fact as to whether or not Theiss had appropriated, or converted the money to his own use. But, to say to the jury that keeping the money in his house, thereby depriving the county of its use, was a conversion and embezzlement of it, took from the jury the right to determine the question of fact as to whether or not he intended to convert and embezzle it. That was erroneous and prejudicial.

The judgment and verdict of the court below will be reversed and the cause remanded for a new trial.

SHOHL, P. J., and HAMILTON, J., concur.

**FAILURE TO SIGN WILL AT THE END THEREOF.**

Court of Appeals for Cuyahoga County.

**HERBSTER ET AL V. PINCOMBE ET AL.**

Decided, February 18, 1918.

*Wills—Signature Made by Mark—But Not at End of the Will—Rendering Document Invalid—Directed Verdict Proper—Creditors of Heirs Interested Parties.*

1. A will is not signed at the end thereof, as required by the statute, where the testator's name and the words "his mark" appear in the handwriting of the scrivner, on the line where the signature of the testator is customarily inserted at the end of the testimonium clause and the space between the words "his" and "mark" is blank, but an X appears between the given name and the surname of the testator on the first line of the attestation clause.
2. Upon motion by plaintiffs to direct a verdict in an action to contest a will, in the absence of ambiguity appearing on the face of the will, it becomes the duty of the court to determine as a matter of law from the will itself whether or not it has been executed and attested in compliance with the requirements of the statute.
3. Where in an action to contest a will, filed by creditors of a son of the deceased, the court finds that the will was not signed at the end, the court should grant a motion by the plaintiffs to direct a verdict invalidating the will, even though answers were filed denying generally the claims of plaintiffs that they were interested parties.

*Smith, Griswold, Green & Haddon, for plaintiffs in error.  
W. H. Boyd and Robert H. McKay, for defendants in error.*

**LIEGHLEY, J.**

Heard on Error.

The parties stood in the same order in the court below.

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\* Motion to require the Court of Appeals to certify its record in this case overruled by the Supreme Court, June 11, 1918.

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Plaintiffs filed their petition in the court of common pleas to contest the will of William Pincombe, deceased, alleging that they are judgment creditors of William S. Pincombe, only son of said testator, and are therefore interested in said will. Said plaintiffs named said William S. Pincombe and the children of said William S. Pincombe as defendants or contestants. The case came to trial before a jury, and the contestants, or proponents of the will, introduced the order of probate and the original will, which were admitted. The proponents then offered to supplement the same with oral testimony bearing upon the due execution and attestation of said will, to which objection was made and sustained. A motion was then made by the contestants or plaintiffs to direct a verdict that said paper writing was not in fact the last will and testament of William Pincombe, deceased, which was overruled. The plaintiffs then reset, and defendants made a motion for a directed verdict sustaining the will, which was granted. Error is prosecuted to this court to reverse the judgment of the court below sustaining the validity of said will.

The following is a copy of so much of said will as is necessary to disclose or exhibit the errors complained of:

"IN WITNESS WHEREOF, I have set my hand to this, my Last Will and Testament, at Cleveland, Ohio, this 11th day of Oct. in the year of our Lord, One Thousand Eight Hundred and Ninety Seven.

"his  
"WILLIAM PINCOMBE.  
"mark

"The foregoing instrument was signed by the said William X Pincombe in our presence, and by him published and declared as and for his Last Will and Testament, and at his request, and in our presence, and in the presence of each other, we hereunto subscribe our Names as Attesting Witnesses, at Cleveland, Ohio, this 11th day of Oct., A. D. 1897.

"A. MARKS FLICK, resides at 753 Republic St.

"WALTER M. McMAHON, resides at 45 Mather St."

The plaintiffs claim that their motion to direct a verdict invalidating the will should have been granted, on the ground

that the will is not signed by the testator at the end thereof, or is not signed at all by the testator.

The statute provides that the order of probate and the will shall constitute *prima facie* evidence of the due execution, attestation and validity of the will. By order of probate is meant the judgment of the probate court admitting the will, and does not include the testimony or evidence upon which the order of probate was made. *Kettemann, Exrx., et al v. Metzger*, 3 C. C., (N. S.), 224.

When this motion was made by plaintiff to direct a verdict, in the absence of ambiguity appearing on the face of the will it became the duty of the court to determine as a matter of law from the will itself whether or not the will had been executed and attested in compliance with the requirements of the statute. The court decided that it had been so executed and attested.

An examination of the original will will disclose that the words "William Pincombe" and the words "his" and "mark" are in the handwriting of the scrivener, and on the line at the end of the will where customarily the signature of the testator appears. The space between the words "his" and "mark" is blank. Certainly this writing at the end of the will can have no legal force and effect standing alone, without the same having been adopted by the testator as his signature and its adoption evidenced by the making in said space his X.

It is claimed by the defendants, in their offer to prove, that the testator did in fact make an X, intending the same to be a signature to this will, but that he mistakenly or inadvertently made the same in the attestation clause between the words "William" and "Pincombe," said words appearing in the attestation clause in the space reserved for the description by name of the person signing the will. This X is not identified by any words such as "his mark;" it is merely a cross or X. It is claimed by the defendants that this X should be considered by the court as the signature of the testator, intended to be placed at the end of the will, and testimony was offered to show that the testator so intended.

The defendants rely for authority to support this will upon

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the case of *Giddings v. Schmuck, Exr.*, 20 C. C. (N. S.), 142, in which case the name of the testator appeared twice in different handwritings in the space reserved in the attestation clause for the description by name of the testator. The court held that one name answered the requirement of the attestation clause, and the other as the signature to the will.

Are there two names in the attestation clause in this will? It reads "William X Pincombe." For the purposes of the attestation clause we should read this as "William Pincombe," omitting the X. For the purposes of a signature to the will we should include the X, although not designated as his mark.

In the case of *Sears et al v. Sears et al*, 77 Ohio St., 104, the testatrix did not sign the will at the end thereof, but wrote her name in the space in the attestation clause. The court held that this failed to answer the requirements of the statute. In the case at bar what appears at the end of the will amounts to a nullity until adopted by the testator as his signature by inserting his X. In our opinion this case is no stronger than the case last above cited. As stated in the *Sears case*, it is not a question of what the testator intended, but what the testator did. Although the X is not identified by any words to identify the making thereof as the act of the testator, the court is asked to say that this X is the signature of the testator at the end of the will. From the face of the will, it is not signed at the end thereof. There is no mark identified as the mark of the testator. Granting that the cross in the attestation clause was made by the testator, and that he thereby intended to sign the will, we have the precise claim that was made in the *Sears case*.

Quoting from the opinion in the case of *Sears et al v. Sears et al, supra*, at page 129:

"True, the statute does enact that the order of probate shall be *prima facie* evidence; but the legislature did not contemplate that a will not signed, or not signed at the end thereof, or not witnessed, ever would be ordered to be probated; and so the matter is not controlled by the statute. It was assumed that the end of the will was self-evident, and the statute was adopted in order to leave no room for the abuses and litigation that had

been invited by the efforts of the courts to give effect to the intentions of testators. When the facts are known, the question whether the will is signed at the end is one of law; and when the will itself shows that it is not signed or attested as required by the statute, it becomes the duty of the court so to instruct the jury. The statute enacts that the order of probate shall be *prima facie* evidence; and so it is; but it also enacts that the defendant shall offer the will, which he did; and, it appearing from the will itself that it was not signed at the end thereof, the *prima facie* case made by the order of probate was overcome. But if it be said that this is technical, and that what the legislature manifestly intended was that the will and the order of probate should make a *prima facie* case, then we have only to say that the legislature could not have intended that it ever should be left to a jury to determine that a will not signed as required by the statute was valid because they found that the testator intended to comply with the statute."

We are of the opinion that this will was not executed, if it was signed at all, by the testator in accordance with the requirements of the statute, and the motion of plaintiffs below to direct a verdict that said paper writing was not the last will and testament of William Pincombe, deceased, should have been granted.

It is claimed by the defendants, however, that the judgment of the court below should be affirmed for the reason that the record fails to disclose any interest which these plaintiffs may have in said will; that there is no proof in the bill of exceptions disclosing that they are judgment creditors as claimed in their petition. It is urged that the defendants filed answers denying generally the claims of the plaintiffs that they were interested parties, and thereby issue was joined which required proof thereof to confer a right in the plaintiffs to contest the will.

The statute provides that any one interested in a will may file a petition to contest the same. The procedure in a will contest is special, and regulated by statute. The issue sought to be determined, and for the determination of which this special proceeding is had, is the decision of whether or not a particular paper writing is or is not the last will of the testator.

The statute provides that the proponents of the will after an issue has been made up shall offer the will and order of probate

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and rest. Up to this point of time the plaintiffs are not called upon to make any proof. After the will and order of probate are admitted in evidence, if the will appears not to have been signed at the end thereof it then becomes the duty of the court as a matter of law to determine whether or not there has been execution of the will as provided by law. Under the state of the pleadings in this case, and holding as we do that this paper writing is not a valid will, and that the motion of the plaintiffs to direct a verdict invalidating the will should have been allowed, we conclude that this claim of the defendants is not well taken.

The judgment of the court below is reversed for error in overruling the motion of the plaintiffs, made after the introduction of the will and order of probate, to direct a verdict invalidating the will, and, coming now to render the judgment which the court of common pleas should have rendered, final judgment is rendered for the plaintiffs in error, and we hold that the paper writing purporting to be the last will and testament of William Pincombe, deceased, is not the last will and testament of William Pincombe, deceased.

Judgment reversed and judgment for plaintiffs in error.

GRANT, J., concurs.

DUNLAP, J., dissents.

**PRIOR RIGHTS AT A STREET CROSSING.**

Court of Appeals for Hamilton County.

SIDNEY CURLIS v. EURETTA G. BROWN.

Decided, February 5, 1917.

*Negligence—As Between an Automobile and a Street Car at a Street Crossing—Automobile Arrives First—Passenger on Street Car Injured.*

1. Where an automobile arrives at a street crossing in advance of a street car, the driver of the automobile has the prior right to cross and in so doing such driver can assume that the street car will approach the crossing in a careful and prudent manner and that it will be under proper control.
2. Where a passenger on a street car is injured in a collision between the street car and an automobile, the owner of the automobile cannot be held liable unless such injury was caused by the negligence of the owner of the machine or its driver.
3. Error can not be predicated on the failure of a special charge to contain all the law of the case, since it is not contemplated that any one special charge should cover every branch of a case.

*Kinkead & Rogers*, for plaintiff in error.

*DeCamp & Sutphin, L. J. Brumleve and Gregor B. Moorman*, for defendant in error.

JONES, OLIVER B., J.

Heard on error.

This action was brought as the result of a collision between a street car, on which plaintiff was riding, and an automobile, belonging to the defendant, in which she was riding. The facts are unusual in that an occupant of the street car rather than of the automobile was injured.

This collision occurred about noon on May 16, 1914, on McMillan street, at its intersection with Alms Place. The street car was an open, summer car, with a step or running board along its right-hand side, on the front end of which plaintiff

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was standing. The street car was running westwardly on the north track, and the automobile came east along the south side of McMillan street from Park avenue and turned north across the tracks toward Alms Place, slowing down before passing over the tracks and proceeding into Alms Place, in order to permit two automobiles to pass, one following the other rapidly westward along the north side of McMillan street. The running board of the street car came in contact with the rear part of the automobile, and a portion of the running board, six or seven feet in length, on which plaintiff was standing, was ripped off and he fell to the street and received severe injuries. The rear fender or mud-guard of the automobile was struck and bent or smashed, and a dent was made in the wooden body, and the automobile was pushed or shunted ten feet or so toward the west curb of Alms Place.

The evidence clearly shows that the automobile arrived at the crossing first and that it was under the control of its driver and had almost stopped before it was started up to cross the north track. It appears that plaintiff, who was an inspector of the Cincinnati Traction Company, and Mr. Wickersham, who was a division superintendent for the same company and at the time of the accident was sitting on the brake wheel on the front platform of the same car, with the motorman, were both on their way to the scene of a fire in the city, that the street car, just prior to the collision, was running as fast if not faster than usual, and that the motorman did not slacken the car as he approached Alms Place until he was so near that he saw the collision was unavoidable, when he reversed the car and it stopped; but it was not until after the collision and it had passed beyond the west line of Alms Place.

The trial resulted in a verdict and judgment for defendant. Plaintiff in error seeks to secure a reversal of that judgment.

The errors relied upon by plaintiff in error relate to the charge of the court. It is contended that in the general charge the court misstated the issue, in practically stating that the issue was whether the plaintiff was injured through the negligence of the defendant by means of the automobile or through the

negligence of the motorman in operating the car on which plaintiff was then riding. This, of course, was not the direct issue, for as a matter of law he might have been injured by the negligence of neither, or as the result of his own negligence. But any error found in this respect is not to the prejudice of plaintiff, but rather to that of defendant. Generally speaking, when two vehicles collide at a street intersection, as in this instance, it is usually the fault of one or the other, possibly of both, of the drivers. Defendant could not be held liable unless the injury was caused by her negligence or that of her driver.

Plaintiff in error also complains that the special charges which the trial court gave to the jury at defendant's request contained undue repetitions of the same legal propositions, in such a manner as to give them improper emphasis, and that the giving of such charges therefore constituted reversible error. These special charges were given to the jury before argument, as authorized under the fifth clause of Section 11447, General Code. They were ten in number, and while in stating necessary facts there was some repetition, yet none of them is unnecessarily long or involved, and each seems to have been directed to specific propositions. Counsel might possibly have reduced the number of these charges and still have covered all the ground. Unnecessary repetitions with little variation are reprehensible and not allowable, but we can not say that the rule laid down in *American Steel Packing Co. v. Conkle*, 86 Ohio St., 117, has been violated, or that defendant's right to special charges was unreasonably exercised; or that the court abused its discretion in giving them. It is not contemplated that any one special charge should cover every branch of a case. *Swing, Trustee, v. Rose et al.*, 75 Ohio St., 355, 369.

The giving of defendant's special charge 2 is claimed as error. It is in the following words:

"The court instructs you that if you find that the automobile of the defendant arrived at the crossing at Alms Place and McMillan street in advance of the street car on which the plaintiff was riding, then the driver of said automobile of defendant

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could assume that the street car would approach the crossing in a careful and prudent manner and that it was under proper control."

The law stated in this charge is supported by *Mansfield Ry., L. & P. Co. v. Kiner, Admx.*, 2 Ohio App., 82; *West, Recr., v. Gillette*, 22 C. C., (N. S.), 369, and *Steubenville & Wheeling Trac. Co. v. Brandon*, 87 Ohio St., 187.

This charge does not pretend to be determinative of the case, or to state all of the law involved, but only as to one of the issues. Error can not be predicated upon its failure to contain all of the law of the case. *Cincinnati Interurban Co. v. Haines*, 8 C. C., (N. S.), 77.

We find no error in the record to the prejudice of the plaintiff in error.

Judgment affirmed.

JONES, E. H., P. J., and GORMAN, J., concur.

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#### APPELLATE JURISDICTION.

Court of Appeals for Lucas County.

TOLEDO PULP PLASTER CO. V. LONG ET AL.

Decided, December 11, 1917.

***Appeal—Action for Money and Foreclosure of Mechanics Lien—Not Appealable, When.***

Where a petition sets forth an amount due for labor and material furnished in the construction of a house for the defendant, and a mechanic's lien to secure the same, and prays for a personal judgment and foreclosure of the lien, and the answer raises an issue only as to the amount due, the action is not appealable.

Warren J. Duffey and George C. Bryce, for plaintiff.

John Schlatter; John O. Zabel and Rupert Holland, for defendants.

CHITTENDEN, J.

Heard on appeal.

Upon argument of this case it was said that the only question presented was whether an action to foreclose a mechanic's lien is appealable under the constitution and laws in effect at this time. The record before this court is such that this question does not arise for decision, as this cause is not appealable, even though it were to be conceded that an action only to foreclose a mechanic's lien is an appealable action.

The petition of the plaintiff sets out an amount due upon an account for labor and material furnished in the erection of a house for the defendants, John Wamsher, Jr., and Anna Wamsher, and a mechanic's lien perfected to secure the account. The petition prays for personal judgment and a foreclosure of the lien. The defendants, Wamsher, by answer make only an issue on the amount due. The same situation exists between these defendants and other cross-petitioners. In this state of the record the cause is not appealable. (*F. P. Rusher Lumber Co. v. Troxel et al.*, 10 C. C., (N. S.), 83, affirmed 76 Ohio St., 626, without opinion.) The circuit court in this county reached a similar conclusion in *Ashley v. The Conant Brothers' Furniture Co. et al.*, 12 C. C., 537.

The appeal will be dismissed.

KINKADE and RICHARDS, JJ., concur.

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**ATTORNEY PAID IN ADVANCE FOR SERVICES IN SUIT  
AFTERWARD DISMISSED.**

Court of Appeals for Hamilton County.

BOLDT V. BAKER ET AL, EXECUTORS.\*

Decided, May 3, 1920.

*Attorney and Client—When Attorney May Deal With Client at Arm's Length—Employment Ceases in Alimony Case When Decree is Entered—Fees Paid in Advance Can Not be Recovered Because of Early Termination of Suit, When.*

1. Prior to the relationship of attorney and client, a lawyer may bargain for his services with a prospective client and deal with him at arm's length.
2. The employment of an attorney to prosecute an alimony case, in the absence of special circumstances to the contrary, terminates upon the entry of a final decree.
3. Where a client enters into a contract with a lawyer to defend a suit, as her attorney, and at the time pays him for same a specified amount, the attorney is to perform with reasonable diligence all professional services required on her behalf in the case named, and if such case is subsequently dismissed without prejudice by the plaintiff, the attorney having performed all services required of him up to the time of the dismissal, the client can not recover, on the ground of failure of consideration, any part of the sum paid the attorney.

*Harmon, Colston, Goldsmith & Hoadly, for plaintiff in error.  
John C. Healy, for defendants in error.*

**BY THE COURT.**

Heard on error.

Plaintiff in error, who was plaintiff below, brought an action against the executors of the late Charles W. Baker, an attorney at law, practising in Cincinnati. The action was in form

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\* Motion to require the Court of Appeals to certify its record in this case overruled by the Supreme Court, October 19, 1920.

similar to the old action for money had and received, plaintiff claiming that the decedent had been unjustly enriched at her expense.

On October 31, 1912, she had entered into a contract with Charles W. Baker, and, on that day paid to him \$4,000, as payment in advance for services in an action for divorce which had theretofore been filed against her by her husband, Charles Boldt. The plaintiff voluntarily dismissed the divorce case on August 18, 1913. Her claim for relief is based on two contentions.

The first is that at the time of the making of said agreement the relation of attorney and client existed between her and said Baker, and that the exactation of said payment was exorbitant and unreasonable, but that this was unknown to her and she relied upon the good faith of her said attorney. She asks that there be returned to her the sum of \$4,000, less reasonable compensation for the services rendered by Baker in the divorce case, which she sets at \$250, leaving a balance of \$3,750 claimed by her.

The second contention is that at the time she employed Mr. Baker in the divorce case it was an implied condition of said advance payment of \$4,000 that said case would be tried, and not dismissed without trial by plaintiff in the divorce case. She says that the divorce case never came to trial, but, on the contrary, plaintiff therein voluntarily, and without any procurement on the part of said Charles W. Baker, did, on August 18, 1913, dismiss said case without prejudice to another action. By reason of this there was a failure on the part of Baker to perform the services that were within the contemplation of the parties at the time the contract was made, and that she is entitled as a matter of law to the return to her of that portion of the fee to be earned by services that were to have been rendered, but, which, in fact, never were performed.

The answer of the defendants contains recitals of fact and averments which are allegations of evidence, but the answer denies that the relation of attorney and client existed between the decedent and the plaintiff at the time of the employment in the divorce suit and the payment alleged in the petition. It

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also alleges that decedent rendered such legal services for the plaintiff in the divorce case as were required by the contract of employment.

The case was tried to a jury in the court of common pleas, and, at the conclusion of the evidence of plaintiff, the court directed the jury to return a verdict in favor of the defendants. Judgment was entered on the verdict and plaintiff prosecutes error.

The defendants at the outset make the contention that the plaintiff could not maintain an action at law, but was first required to proceed in equity to set aside the agreement. That this doctrine, applicable to deeds to real estate and to releases in personal injury cases, is not of universal application is settled in this state by the case of *Taylor v. Brown*, 92 Ohio St., 287, 299. Where the remedy at law is adequate and full, it may be had without a judicial rescission.

We will, therefore, take up the two grounds on which plaintiff bases her claim to recovery.

The record shows that on November 8, 1909, plaintiff employed Baker as her attorney to bring an action against her husband for alimony in the court of insolvency of Hamilton county, Ohio. From a decree in her favor, the defendant appealed to the circuit court, and while the suit was pending the parties made a contract of separation, and adjusted their financial matters, and this contract was incorporated in the final decree of the circuit court, entered December 14, 1911. Under the terms of this agreement, Mrs. Boldt was to pay her own attorney's fees, and she did pay decedent a check for \$3,500 that she received by the contract and decree. There is no evidence of any further employment or continuance of the relation of attorney and client between Baker and Mrs. Boldt prior to the agreement here in question, except such as is furnished by the following:

In August, 1912, there was a reconciliation between Mrs. Boldt and her husband, and, on August 19, 1912, a letter addressed to Charles W. Baker and signed by Charles Boldt was delivered to Mr. Baker's office by Mrs. Boldt, wherein Mr. Boldt

said that a reconciliation had been effected, and that he had agreed to make certain payments.

On October 2, 1912, Mr. Baker sent to Mrs. Boldt a bill for \$1,000 for professional services, and, on October 11, caused a letter to be written to her calling her attention to the fact that the bill was unpaid and requesting her to pay.

The domestic felicity of the Boldts terminated shortly after the reconciliation, and, on October 29, Charles Boldt brought an action for divorce in the court of common pleas. Two days later, Mrs. Boldt entered into a written contract with Charles W. Baker, which is as follows:

"Mrs. Amalia W. Boldt has this day employed C. W. Baker as her attorney in the case of *Boldt v. Boldt*, No. 151955, court of common pleas.

"She now pays him for same, and for amount One Thousand (\$1,000) Dollars heretofore due, Five Thousand (\$5,000) Dollars.

"If the court in case No. 151955, makes any allowance for fees such allowances are to be turned over by Mr. Baker to her.

"Charles W. Baker,  
"Amalia M. Boldt."

She then paid the sum therein stipulated. Baker then took charge of plaintiff's case, filed an answer and took depositions. At the expiration of nine months Charles Boldt dismissed his petition without prejudice. Mrs. Boldt testifies that she was not aware of the dismissal of the action until after the death of Mr. Baker on April 14, 1917.

The relation of attorney and client imposes upon the attorney a duty of trust and confidence towards his client in any dealings had between them while the relation exists. The law requires that all dealings between them shall be characterized by the utmost fairness and good faith. 6 Corpus Juris., page 686; 2 Thornton, Attorneys, Secs. 428-430, and Weeks, Attorneys, Sec. 268, 276.

Prior to assuming the relation of attorney and client a lawyer may bargain for his services with one proposing to employ him and may deal with him at arm's length. *Carlton v.*

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*Dustin*, 9 Dec. Re, 51 (10 Bull., 294). If the relation of attorney and client which had once existed between the parties in the conduct of the alimony suit had ended, and the parties no longer stood in their former relations to each other, Baker could legally enter into such a contract on October 31, 1912, as he deemed advantageous. As a general rule, and in the absence of special circumstances to the contrary, employment of an attorney to prosecute an alimony case presumptively terminates upon the entering of a final decree. *Reynolds v. Reynolds*, 31 O. C. A., 129; *Newkirk v. Stevens*, 152 N. C., 498 (67 S. E., 1013), and 1 Thornton, Attorneys, Sec. 142.

The termination of the litigation, while it ends the power of the attorney to bind the client, does not necessarily end the duty of the attorney in dealing with the client. There are cases which show that the doctrine of *uberrima fides* may outlast the relationship itself, and that the rule should be applied so long as the influence arising from the relationship is proved to exist. See 6 Corpus Juris., 689; 1 Perry, Trusts (6 ed.), Sec. 202, and *Hill v. Hall*, 191 Mass., 253 (77 N. E., 831).

As shown by the case last mentioned, this doctrine is usually applied in connection with dealings between the attorney and the client concerning the fruits of the litigation.

In the case at bar there is no evidence that the influence of the attorney persisted subsequent to the termination of the alimony suit in any other sense than that Mrs. Boldt had the confidence in Baker which a client has in the capacity of the lawyer who successfully conducts his litigation.

Counsel for plaintiff in error have stressed the argument that the employment of Mr. Baker was for the "marital troubles" of Mrs. Boldt, of which the alimony suit was only part. The basis for this is a phrase in the cross-examination of Charles Boldt, occurring in the question of counsel for plaintiff in error directed toward the time of Mr. Baker's employment. Charles Boldt had no knowledge other than hearsay of what the employment of Mr. Baker was, nor does his testimony fairly construed show that he intended to testify as to the terms of her contract. All that the record fairly shows in connection with

his employment in the alimony case is that he was Mrs. Baker's counsel in that suit. There is no evidence that he was first employed to represent her in any other marital affairs than that. What then is the effect of the bill by Baker and the letter by Boldt? The bill does not recite the services which are the basis of the charge, and there is no presumption of law that they were subsequent to the rendition of the alimony decree. One may owe a bill for legal services to an attorney, whose services and whose employment have entirely ceased, nor does the fact that the bill remains unpaid tend to establish that there is any influence still existing. The contention of the plaintiff in error, carried to its legal conclusion, would subject every attorney re-employed by a client, to a suit in which he would have the burden of proof to show affirmatively that the new contract of employment was fair.

The letter by Charles Boldt to Mr. Baker shows that Mrs. Boldt desired Baker to know of the new promises by her husband. It falls short of establishing that Baker thereby charged himself with new duties and disabilities. It must be remembered that the letter was written to him, and not by him. If he did not regard himself as attorney for Mrs. Boldt at that time, he was not called upon to answer the letter of Mr. Boldt. No authority has been found justifying any presumption that the influence presumably gained over a client by an attorney in litigation survives the termination of the services performed for a period of ten months in a transaction not about the fruits of the original litigation. There was no evidence that Baker and Mrs. Boldt occupied the relation of attorney and client on October 31, prior to the making of the written contract, and the burden of proof of fairness does not devolve upon the administrators of the attorney, now deceased.

The argument of the plaintiff in error as to the construction of the contract is as follows:

The contract is for services to be rendered regarding a particular subject-matter. The subject-matter has ceased to exist without fault of either party, and, therefore, performance is excused. The argument is illustrated by examples of painting

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a portrait of a particular person, contracts of marriage, contracts for repairing a particular building or vessel, for services of a specific person, for purchase of a specified crop from a specified tract of land. In the enumerated instances, if the person whose portrait is to be painted die, if the engaged person die before marriage, if the chattel perish, if the person who is to render services die, the contract is at an end and need not be performed. The continued existence of the thing is an implied condition of performance. See *Taylor v. Caldwell*, 3 B. & S., 826, and 6 Ruling Case Law, page 1005.

The agreement of the parties in this case shows that "Mrs. Amalia W. Boldt has this day employed C. W. Baker as her attorney in the case of *Boldt v. Boldt*, No. 151955, Court of Common Pleas. She now pays him for same \* \* \*." By the terms of the agreement, Baker was to perform all professional services required on her behalf in that case with reasonable skill and diligence. The parties were contracting with reference to a pending lawsuit. Just what might be required before its termination no one could forecast with certainty. The litigation might have required a great amount of labor, or it might have been completed after a short time, and with comparatively little effort. The services contemplated the termination of the lawsuit and not its continued existence. Such is the intention of the parties as shown by the agreement itself, and, if it does not correctly express their agreement, relief should be had by reformation and not by construction contrary to the meaning of the words used.

Unlike the cases used in illustration of the argument for plaintiff in error, the contract is aleatory in its nature. When Mrs. Boldt had made the payment agreed upon, the risk as to the amount of work that would be required to perform it was upon Baker. It never could be completely performed until the lawsuit ended. In this respect it bears a closer resemblance to a contract to support a person during life, such as the case of *Drefahl v. Rabe*, 132 Ia., 563. While such an agreement relates to the life of an existing person it is only fully performed when such person dies. The occurrence of the death before the

parties expected would not require a repayment of any part of the consideration. The party to a contract who gets what he bargained for may not complain of failure of consideration, though the consideration may have been more easily furnished than he anticipated. Mrs. Boldt must have known that the plaintiff could dismiss the action for divorce. A case further illustrating one of the principles here involved is *Woodward v. Cowing*, 13 Mass., 216. There the plaintiff paid money to an officer of a privateer for a one-fourth share of the prize money that he might make during the cruise on which he was then bound. A few days later, a treaty of peace between the United States and Great Britain required a cessation of the cruise. The court held:

"Where money has been paid upon a consideration, which has failed, it may certainly be recovered back by the party who shall have paid it. But such, in our opinion, was not the case before us. There were many risks, equally known to the parties, and which must be presumed to have been considered by them, when making their contract. The return of peace must have been one. The plaintiff purchased a chance to obtain money by captures from an existing enemy. The government of their country annihilated that chance, by making such captures unlawful. We have no hesitation in saying that the defendant has a right to retain the money paid him."

If the lawyer had been disabled from performing the services agreed upon, and, therefore, did not perform, he could not retain the entire fee which had been paid in advance. *Baylor v. Morrison*, 2 Bibb (Ky.), 103; *Callahan v. Shotwell*, 60 Mo., 398; *Baird v. Ratcliff*, 10 Tex., 81, and *Coe v. Smith, Admr.*, 4 Ind., 79 (58 Am. Dec., 618).

Mr. Baker represented Mrs. Boldt from the time of his employment until the case was terminated. He completed the task for which he was employed. The record shows, therefore, that there was no prevention of performance on his part by any unforeseen contingency, but that he performed the agreement in accordance with its terms.

The conduct of the trial court in directing a verdict in favor of the defendants was not erroneous.

SHOHL, HAMILTON and CUSHING, JJ., concur.

**GROUNDS OF DENIAL OF APPLICATION MUST BE ALLEGED.**

Court of Appeals for Cuyahoga County.

**RUSSITTO v. OTIS STEEL CO.\***

Decided, November 28, 1919.

*Appeal—From Action by the Industrial Commission—Denying Application of Injured Workmen for Continuance of Compensation—Grounds for the Denial Must be Alleged.*

A petition which does not allege the grounds upon which the industrial commission denied the right of an applicant to continue to participate in the workmen's compensation fund, does not state facts sufficient to show the right to prosecute appeal under Section 1465-90, General Code (107 O. L., 162), and is subject to demurrer.

*G. E. Morgan*, for plaintiff in error.

*Squire, Sanders & Dempsey*, for defendant in error.

**WASHBURN, J.**

Heard on error.

The determining question in this case may be stated without the labor of detailing the facts. It is as follows:

A workman is injured and files his claim with the industrial commission, which claim is allowed, and paid until the commission determines that his earning capacity is no longer impaired and denies him the right to further participate in the fund. Can he prosecute an appeal to the common pleas court from the order of the commission denying him the right to further participate in the fund, without alleging in his petition the grounds upon which such denial was made?

Such an appeal was attempted in this case, and, a demurrer to the petition being sustained, judgment was entered against the workman. The question here presented was not raised or argued in the case of *Di Cicco v. Industrial Commission*, 30 O.

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\*Motion to require the Court of Appeals to certify its record in this case overruled by the Supreme Court, February 17, 1920.

C. A., 166 (11 O. App., 271). That case was tried upon an agreed statement of facts, and the only question presented or determined was the meaning of the term "earning capacity," as capacity," as used in the statute.

This record presents the question of the right to appeal when the grounds of denial by the commission are not set forth in the petition. That right depends upon the provisions of Section 1465-90, G. C., as amended 107 O. L., 162, which is, in part, as follows:

"The commission shall have full power and authority to hear and determine all questions within its jurisdiction, and its decision thereon shall be final. Provided, however, in case the final action of such commission denies the right of the claimant to participate at all *or to continue to participate* in such fund on the ground that the injury was self-inflicted or on the ground that the accident did not arise in the course of employment, or upon any other ground going to the basis of the claimant's right, then the claimant, within thirty (30) days after the notice of the final action of such commission, may, by filing his appeal in the common pleas court of the county wherein the injury was inflicted, be entitled to a trial in the ordinary way, and be entitled to a jury if he demands it."

A reading of this statute without reference to any changes made in it by amendment since its original enactment would lead to the natural conclusion that the right of a claimant to appeal, whether he had been denied the right to participate or the right to continue to participate in such fund, is granted only when the denial of such right is on the ground that the injury is self-inflicted, or on the ground that the accident did not arise in the course of employment, or upon some other ground going to the basis of the plaintiff's right; in other words, if the commission determined that it had no jurisdiction because the claimant had no rights in the fund, then the right of appeal was granted, but if the commission determined that the claimant had some rights in the fund, and made a *bona fide* award, then there was no appeal. This seems to be the plain meaning of the language used, and the only doubt about that being the

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proper construction is the fact that under that construction one who is denied the right to *continue* to participate seldom, if ever, could appeal, for the reason that it would seldom, if ever, happen that one who was denied the right to continue to participate would be denied that right on the grounds set forth.

The statute as it was first enacted is in all respects the same as quoted above, with the exception of the clause, "or to continue to participate," so that the statute then gave the right to appeal only in the case the commission denied the right of the claimant to participate at all in the fund, and then only when the denial was upon the grounds stated, which, as has been said, was not changed by the amendment.

When the statute so read it came before the Supreme Court for construction in the case of *Snyder v. State Liability Board of Awards*, 94 Ohio St., 342, and it was there determined that "as a condition precedent to the right of claimant to file his appeal in the court of common pleas, there must be a denial of his right to participate at all in such fund, *based upon one of the jurisdictional matters* enumerated in the section."

In the opinion the court say, at page 347:

"It is to be observed that the statute which confers the right of appeal does so upon condition that final action of the board denies the right of the claimant to participate at all in the fund, *upon one of the grounds therein enumerated*. This right of appeal proceeds upon the theory that there has been a finding by the board that it is without jurisdiction to act in the matter. If the board should find that the injury complained of was self-inflicted or that the injury did not arise in the course of employment, or that there was some other ground which went to the basis of claimant's right, then the board, being without *jurisdiction*, must necessarily deny the right of claimant to participate. The claimant then under the provision in the statute in question has his day in court, and it is expressly provided that after the appeal is perfected and the pleadings are filed the court or a jury under the instructions of the court, if a jury is demanded, shall determine the right of the claimant to participate in the fund. That is the first question to be determined by the court or jury. If it is determined adversely to the claimant, that is the end of the matter. If there is a finding in his favor then the court or jury goes fur-

ther and fixes the compensation within the limits and under the rules prescribed by law, and the judgment so obtained shall be paid out of the insurance fund."

This case authoritatively settled the construction which was to be placed upon this statute, when there was no attempt to confer the right of appeal upon a claimant who had been denied the right to *continue* to participate. After that decision the Legislature inserted in the statute the words "or continue to participate."

It may be conceded that the Legislature, by so amending the law, intended to confer some sort of right of appeal upon a claimant who had been granted the right to participate, but later had been denied the right to *continue* to participate, but it provided that in order that such right of appeal might exist the denial of the commission had to be upon the same grounds as applied in the case where the commission denied the right to participate at all; that is, upon grounds which the Supreme Court had determined were jurisdictional matters.

The result is that the amendment either conferred the right of appeal upon a workman who is denied the right to continue to participate, but limited that right of appeal to cases where the denial was upon grounds that can seldom, if ever, exist, and therefore, for all practical purposes, conferred no right of appeal at all, or else it conferred the right of appeal regardless of the ground upon which the commission's denial is based. If we adopt this latter conclusion, then the result will be that the claimant whose right has been recognized, and thereafter his right to further continue to participate in the fund has been denied, may in all cases appeal to the common pleas court. We do not think that the language of the statute, when construed with the other sections of the statute governing the work of the commission, authorizes us to say that the Legislature intended to confer a right of appeal in all cases where the claimant has been denied the right to continue to participate in the funds. The commission is given authority to pass upon all claims made, and a continuing power to increase or decrease allowances and

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exercise jurisdiction over its awards, and the statute provides that its decisions shall be final upon all questions within its jurisdiction, except only that the right of appeal is given where the denial of the claimant's right to participate or to continue to participate is on the jurisdictional grounds above referred to.

We know of no rule of construction which will permit the court to ignore and totally disregard the plain meaning of the words used in the statute, where such meaning has been established by the Supreme Court in construing the original statute, and where the same language is used in the amended statute, even though such meaning conflicts with a supposed but not plainly expressed intention of the Legislature in making the amendment to the statute. Especially is this so if to ignore such meaning would ascribe to the Legislature an intention to confer the right of almost unlimited appeal, and thus reinvest the courts with jurisdiction which it was the object of the compensation act to take away from courts.

This construction gives to the amendment a limited application which is of no practical effect, and that is that a denial to continue to participate on a ground going to the basis of the claimant's right means such ground as, if known to the commission or properly considered by it at the time of the original award, would have established lack of jurisdiction to make the award; but we are of the opinion that in any event it does not mean a ground based upon the character and extent of the claimant's injuries or the degree to which he has recovered his health and strength.

Moreover, the statute allowing the appeal does not provide for an appeal in the sense in which an appeal is taken from the decision of a court (*State v. Creamer*, 85 Ohio St. 349), and the statute provides that the claimant shall file his petition within thirty days after the notice of the final action of the commission.

All the information that is contained in the petition in reference to this subject is in the paragraph which follows:

"Subsequent to such injury plaintiff applied to the Industrial Commission of Ohio to require defendant to pay compensa-

tion to plaintiff, and such industrial commission awarded to plaintiff compensation at the rate of \$11.60 per week from one week after the date of such injury until March 1st 1918, being entitled to \$662.80, whereupon said Industrial Commission refused to order defendant to pay further compensation to plaintiff, and plaintiff filed his appeal to this court on February 18, 1919."

The petition in this case does not set forth the grounds upon which the commission denied the plaintiff's right to continue to participate in the fund, and it does not state facts sufficient to show plaintiff's right to prosecute the appeal, and therefore it does not set forth facts sufficient to constitute a cause of action.

The demurrer to the petition was properly sustained.

DUNLAP and VICKERY, JJ., concur.

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**INSUFFICIENT PROOF AS TO CONTRACT TO PAY MEMBER  
OF THE FAMILY FOR SERVICES.**

Court of Appeals for Hamilton County.

**HEIDOTTING, EXR., v. HEIDOTTING.**

Decided, February 26, 1917.

*Express Contract to Pay for the Services of a Daughter-in-Law—Not Shown by Expressions of Gratitude, Etc.*

1. A daughter-in-law can not recover compensation for services rendered to her father-in-law while residing in his home with her family, in the absence of an express contract established by clear and convincing proof.
2. In such case expressions of gratitude by the father-in-law towards his daughter-in-law for her care and kindness, and some expressions of an intention to remember her in his will, are not sufficient proof of an express contract to pay for the services.

*Moulinier, Bettman & Hunt, for plaintiff in error.  
Geo. H. Kattenhorn, for defendant in error.*

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**HAMILTON, J.****Heard on error.**

The plaintiff below, Charlotte Heidotting, recovered a judgment against the plaintiff in error on a claim for personal services rendered Johan Albert Heidotting during the last years of his life.

The suit was brought against the executor of the estate of Johan Albert Heidotting, the said plaintiff declaring upon a contract both express and implied, and no election as to the kind of contract was requested or required.

The plaintiff below, the defendant in error herein, was the wife of said executor, defendant below, who was the son of Johan Albert Heidotting.

For about two and one-half years prior to his death the said Johan Albert Heidotting was in failing health and afflicted with a cancer of the face. He was the owner of the residence wherein he resided, and upon the death of his wife he desired one of his sons, of whom there were two, with his family, to move in with him. One son, Joseph Heidotting, refused to move in with his father unless his father would first deed to him the said residence property. This the father did not do. Thereupon the son Henry Heidotting, and his wife, the plaintiff below, and their children, then moved in with the father and lived in his residence until his death two and a half years later, during which time the plaintiff below rendered services of the character alleged in her petition. The said father occupied a room on the second floor of his residence, staying therein a part of the time, and receiving his meals there a part of the time, delivered to him by his daughter-in-law, and a part of the time taking his meals with the family. No restrictions were placed by either party upon the use of the whole or any part of the premises by either the father or the son Henry and his family. No rent was charged Henry by his father, and no board was charged his father by Henry. The father devised the said residence property to his said son Henry, who is now in possession of said premises.

The question is: Did the family relation exist between these parties? The evidence discloses that the family relation existed, and brings the case clearly within the rule laid down in the case of *Hinkle et al, Exrs., v. Sage*, 67 Ohio St., 256, and as modified in *Merrick v. Ditzler*, 91 Ohio St., 256, requiring "clear and convincing" proof of an express contract.

It therefore follows that to enable the plaintiff to recover she must produce evidence to show a contract by "clear and convincing" proof. This we think the evidence fails to do. The only evidence tending to show a contract is contained in expressions on the part of the father of gratitude towards his daughter-in-law for her care and kindness to him, and some expressions of an intention to remember her in his will. This falls far short of being clear and convincing proof of an express contract to pay for the services as claimed.

The judgment of the common pleas court is reversed and the case remanded for a new trial.

JONES, P. J., and GORMAN, J., concur.

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**LIABILITY OF THE PULLMAN COMPANY FOR LOSS OF A  
PASSENGER'S EFFECTS.**

Court of Appeals for Hamilton County.

**THE PULLMAN CO. v. LAWS.**

Decided, March 10, 1919.

*Instructed Verdict—Motion for Must be Renewed at Close of the Evidence—Pullman Company Not an Insurer, or Common Carrier, or Innkeeper.*

1. It is necessary when a motion for an instructed verdict is made and overruled at the conclusion of plaintiff's evidence that such motion should be renewed at the conclusion of all the evidence, and if there is no evidence of negligence appearing in the case up to its conclusion it is the court's duty as a matter of law to instruct a verdict; but if evidence appears which tends in any degree to establish negligence by the defendant the court must submit the question to the jury.
2. A sleeping-car company is not liable as insurer of a passenger's baggage or effects, nor is its obligation that of a common carrier or innkeeper, but it is liable for negligence only in failing to exercise ordinary care.

*Mortimer Matthews, for plaintiff in error.**DeCamp & Sutphin, for defendant in error.***CUSHING, J.**

Heard on error.

The facts developed at the trial were that the plaintiff, Florence E. Laws, and her husband engaged, paid for and occupied a stateroom in a sleeping car of plaintiff in error, operated from New Orleans to Cincinnati; that shortly after the train to which the Pullman was attached left New Orleans, at 7:30 p. m., March 30, 1917, they went to the dining-car at the rear, leaving the hand bag here in question in the stateroom, the door of which was open; that on leaving the Pullman they notified the porter that they were going to the diner; that they were absent about

an hour or an hour and a half; that the hand bag and its contents were stolen while they were absent; that the porter was in the Pullman during the entire time; that he was engaged in making down berths; and that a number of persons from other parts of the train passed through this Pullman while the porter was thus engaged.

The petition in the court below charged that the Pullman Company was negligent in assigning and permitting the porter to perform too many duties, and the porter was negligent in failing to watch the aisles and the drawing-room while strangers to the car were passing through it to and from the dining-car.

The company's answer was a general denial.

There were three Pullmans on the train. There was one conductor. Each Pullman had a porter.

The several questions presented by the record are:

1. Was the defendant negligent in any of the particulars stated in the petition in the court below?
2. The care that a sleeping car company must use in guarding the baggage and personal effects of persons occupying space in such car.
3. The error, if any, of the trial court in overruling a motion for an instructed verdict for defendant at the close of plaintiff's evidence and such motion at the conclusion of all the evidence.
4. The refusal of the trial court to give special charges, properly presented, on the question of ownership by defendant in error of the several articles in question as her separate property.
5. The claim of plaintiff in error that the verdict was not sustained by the weight of the evidence and was contrary to law.

Plaintiff below did not offer any evidence as to where the porter was or what he was doing during the interval in question. Her evidence was limited to what happened prior to and at the time they left the Pullman to go to the diner and to their discovery of the theft on their return from the diner.

On this state of the record, at the close of plaintiff's evidence, defendant moved for an instructed verdict. The motion was overruled.

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Had defendant below rested its case at that point the court should have directed a verdict in its favor.

The Pullman Company elected to offer evidence in the court below. It called as its principal witness the porter, Gaines. He testified in substance that the stateroom door was open; that Mr. Laws told him when leaving the Pullman that he and his wife were going to the dining-car; that they were gone about an hour or a little more; that on their return they notified him of the theft; that as soon as the train started from the New Orleans station he was engaged in making down berths; that persons from other parts of the train passed through his car on their way to and from the diner; that he would raise up from a stooping position or step aside while making down berths to allow such persons to pass; and that the aisle of the car and the drawing-room door could at all times have been observed by him, but that he did not watch strangers to his car while they were passing the drawing-room door.

This was evidence tending in some degree to establish plaintiff's allegations of negligence. The case at this point was properly submitted to a jury.

It is necessary under Ohio practice when a motion is made at the conclusion of plaintiff's testimony for an instructed verdict, and overruled, that it should be renewed at the conclusion of all the evidence. The reason for so doing seems to be that if there is no evidence of negligence appearing in the case up to its conclusion it is the court's duty as a matter of law to instruct a verdict; but if evidence appears, offered either by the plaintiff or the defendant, which tends in any degree to establish the negligence of the defendant company, the court must submit the question to the jury.

In the case of *The Cincinnati Traction Co. v. Durack, Admx.*, 78 Ohio St., 243, the Supreme Court said, at page 247:

"There are perhaps three views taken of the subject which are properly present for our consideration. One is that where the court overrules the motion of the defendant for a verdict at the close of the plaintiff's evidence, and the defendant introduces his evidence to make out the defense, and rests without

renewing the motion the exception to the ruling on the motion made is waived and error can not be assigned on such ruling. Another view suggested is, that where such motion made at the close of plaintiff's evidence is improperly overruled, and the evidence afterwards introduced by the defendant, and by plaintiff in rebuttal, in no manner strengthens the plaintiff's case, the motion for verdict at the close of plaintiff's evidence must be given force, since defendant's waiver of it by going into the defense only goes to the extent of allowing plaintiff to benefit by the evidence afterwards introduced.

"The third view is that the exception to the decision of the court denying a motion for verdict at the close of plaintiff's evidence is not waived by putting in the evidence for the defense, but lives throughout the trial, survives an adverse judgment, and remains as a basis for assigning error in the reviewing court. The latter and perhaps the preceding view is held by the plaintiff in error, but the reasons advanced for the claim are lacking in force and will not bear analysis."

On the question of the degree of care that must be exercised by a sleeping car company the weight of authority is that it is held only to ordinary care.

Courts are almost unanimous in holding that a sleeping car company can not be held to the liability of a common carrier, nor of an innkeeper.

While such company must exercise ordinary care, some courts have made a distinction between the care in daytime and at night. The distinction is based on the time when the occupant is awake and charged with the duty of exercising ordinary care for the protection of his own property, and when he is asleep and not in a position to guard his property.

It is not necessary for us to pass on that question here. The undisputed facts in this case are that defendant in error was awake, in either the sleeper or diner, from the time she and her husband boarded the train until after the property was stolen.

On the question that a sleeping car company owes to occupants ordinary care, we cite the following:

"A sleeping-car company is not liable to a passenger for the loss by theft of personal effects taken into the car by the passenger for his own use and of which he retains possession, either

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under the rules which apply to an innkeeper for the loss of the goods of his guest, or those as to a carrier for the loss of baggage intrusted to it to transport. Such a company owes to a passenger the duty of exercising reasonable care to guard the property of the passenger, from theft, and if through the want of such care the personal effects of the passenger, such as he might reasonably carry with him, are stolen, the company is liable therefor." *Pullman's Palace Car Co. v. Hall*, 106 Ga., 765.

"It is the duty of a sleepin-car company to exercise reasonable care to guard the personal effects of the passengers from theft, and if, through the want of that care such personal effects as a passenger may properly carry with him on his journey be stolen, the company will be liable therefor. The personal effects which a passenger may carry with him on a journey may include articles of personal adornment, such as jewels." *Pullman Co. v. Schaffner*, 126 Ga., 609.

Thus a sleeping car company does not assume the liability of insurer of a passenger's baggage nor the obligation of a common carrier or innkeeper, but its liability for loss must be predicated upon negligence. *Goldstein v. Pullman Co.*, 161 App. Div., 756, 147 N. Y. Supp., 133; *Dings v. Pullman Co.*, 171 Mo. App., 643, 154 S. W. Rep., 446, and *Robinson v. Southern Ry. Co.*, 40 App. D. C., 549.

Before argument the defendant company requested a number of special charges, of which the following is a sample:

"The jury is instructed that the plaintiff can not recover in this action the value of the black seal hand bag for the reason that there is no evidence tending to show that it was her separate property."

The other charges are similar as to the various items of property.

Both the defendant in error and her husband testified that all the articles were her property.

Section 8001, General Code, reads as follows:

"A married person may take, hold and dispose of property, real or personal, the same as if unmarried."

On the question as to whether the verdict is contrary to the evidence and the law. We have stated the rule of negligence,

the liability of a sleeping car company in negligence cases, and the law of Ohio as to the wife's separate property. It follows that the verdict was not contrary to the evidence or law.

The judgment will be affirmed.

SHOHL, P. J., and HAMILTON, J., concur.

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#### SCOPE OF EMPLOYMENT COVERS LUNCH HOUR

Court of Appeals for Warren County.

#### TAYLOR V. INDUSTRIAL COMMISSION.\*

Decided, July 19, 1920.

*Workmen's Compensation—Employee Injured While Resting, Lunching and Smoking—His Right to Compensation Upheld—Declaration by Him Immediately After the Injury not Hearsay.*

1. On appeal from the finding of the Industrial Commission of Ohio, denying the right of a claimant to participate in the state insurance fund, evidence of a statement by the party injured declaring the circumstances of the injury, where the statement is made immediately after the injury, in the presence of the person testifying, who asserts the circumstances as observed by him, constitutes an exception to the hearsay rule, and is admissible.
2. Where a workman does such things as are usually and reasonably incidental to the work of the employer, including the taking of refreshment, rest and smoke, which are not forbidden by the employer and in so doing is injured, it can not be said as a matter of law that the injury was received outside the course of his employment.

*Howard W. Ivins and H. S. Stevenson*, for plaintiff in error.  
*John G. Price*, Attorney General; *R. R. Zurmehly*, and  
*F. M. Cunningham*, Prosecuting Attorney, for defendant in error.

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\*Motion for an order directing the Court of Appeals to certify its record in this case overruled, October 19, 1920.

HAMILTON, J.

Heard on error.

The action below was an appeal from the finding of the Industrial Commission of Ohio denying the right of the claimant, Gussie Taylor, as the widow of John Taylor, to participate in the state insurance fund.

The case was tried to a jury. At the close of plaintiff's evidence, the defendant, the Industrial Commission, moved for a directed verdict on two grounds: First, that there was no direct or circumstantial evidence of the injury complained of; and, second, that the injury complained of was not received by the decedent in the course of his employment, nor did it arise out of a hazard incident to his employment. The trial court refused the motion on the first ground, but sustained it on the second, and directed a verdict for the defendant.

Did the trial court err in directing a verdict for the defendant?

While the trial court based its instructed verdict on the second ground of the motion, if the defendant was entitled to an instructed verdict on either ground the judgment would stand; as the court may have rightly instructed the jury, but for the wrong reason.

We will first consider the question whether or not there was any evidence of the injury complained of. The evidence tends to show that Taylor, the deceased, was a nightwatchman at the Peters Cartridge Company's factory at King's Mills, Ohio, and was on duty on the night the injury is claimed to have occurred; that he went on duty at 5:11 p. m. and worked until 6:02 a. m. approximately 13 hours. With the sanction of the employer, about 12 o'clock, an hour for lunch, rest and recreation was taken. On the night in question, during the recreation hour, Taylor, who at the time appeared all right, stepped out of the company's shop on to the company's property to smoke. In going out he passed down some concrete steps leading from the shop. In a very brief period of time, approximately two minutes, he returned, holding his back and seemingly in pain, and

immediately stated to other workmen, as testified to by them, that in going out he had fallen on the concrete steps and injured his spine. Taylor continued to suffer and died there weeks later. There was medical evidence of an injury to the spine.

It is urged by defendant in error that evidence of the workmen as to what Taylor stated regarding the circumstances of the injury was hearsay only, and was improperly admitted over the objection of the defendant, and that without this evidence there is no evidence of any injury. The trial court admitted the evidence of the workmen regarding these statements of deceased on the ground that they were a part of the *res gestae*.

The general rule is that evidence of the statement by the party injured declaring the circumstances of the injury, made a considerable time after the happening, is hearsay and inadmissible, but where the statement is made immediately after the injury, in the presence of the person testifying, who asserts the circumstances as observed by him, this evidence constitutes an exception to the hearsay rule and is admissible. (3 Wigmore, Evidence, Sec. 1746). Many cases where the courts have admitted such evidence, are cited by this excellent author, some on the ground that the statements were a part of the *res gestae*, some under the verbal-act doctrine, as being a part of the principal fact, and some as an exception to the hearsay rule. He then observes:

"It cannot matter what names or phrases the courts chance to use,—whether they disguise the ruling under the phrase *res gestae* or otherwise. The material thing is what the courts actually do, not what names they use."

And, again, this same author in Sec. 1747 uses this language:

"This general principle is based on the experience that, under certain external circumstances of physical shock, a stress of nervous excitement may be produced which stills the reflective faculties and removes their control, so that the utterance which then occurs is a spontaneous and sincere response to the actual sensations and perceptions already produced by the external shock. Since this utterance is made under the immediate

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and uncontrolled domination of the senses, and during the brief period when considerations of self-interest could not have been brought fully to bear by reasoned reflection, the utterance may be taken as particularly trustworthy (or, at least, as lacking the usual grounds of untrustworthiness), and thus as expressing the real tenor of the speaker's belief as to the facts just observed by him, and may therefore be received as testimony to those facts."

In the case of *State v. Wagner*, 61 Me., 178, 195, the court held such statements admissible as being analogous to dying declarations, to which necessity and sincerity impart character. Further, in 3 Wigmore on Evidence, Section 1746, above cited, the author says that within the last generation the admissibility of such evidence is firmly and unquestionably established.

The evidence was properly admitted.

This conclusion is further supported by the case of *Insurance Co. v. Mosley*, 75 U. S. (8 Wall.), 397; also by *Travelers' Protective Association of America v. West*, 102 Fed., 226.

In *Insurance Co. v. Mosley*, *supra*, the court held the principal fact to be the bodily injury. This was an insurance case.

The case of *Travelers' Protective Association of America v. West*, *supra*, was where one West came up out of a cellar and made statements of having bumped his head on a gas fixture. West died, and witnesses were permitted to testify to the statements made by West at the time. There was no direct evidence of the alleged accident. The United States circuit court of appeals on review held the evidence admissible as *res gestae*, on the authority of *Insurance Co. v. Mosley*.

*Union Casualty & Surety Co. v. Mondy*, 18 Col. App., 395 [71 Pac. 677], is also in point.

The next question then for consideration is, Did the trial court err in instructing the jury for the defendant on the second ground of the motion, that the injury complained of was not received in the course of the employment?

Again adverting to the facts appearing in the record, there was evidence tending to show that decedent was under the con-

tinuous employment of the cartridge company from 5:11 p. m., May 6, 6:02 a. m., May 7, with a rest and recreation period, with the sanction of the company, about the midnight hour; that during the rest period decedent went out of the shop of the employer, on the premises of the employer, to smoke, and fell on the concrete steps leading down from the shop, resulting in injury to the spine.

It was contended by defendant in error, and was so decided by the trial court that in going out to smoke decedent was on his own business and the injury was not received in the course of his employment.

Many cases are reported where the facts are somewhat analogous, and are of assistance in arriving at what in our opinion is the trend of authority.

In the case of *Chludzinski v. Standard Oil Co.*, 176 App. Div., 87 [162 N. Y. Supp., 225], an employee in an oil refinery went into his locker room for some unknown reason, and, after a short time, rushed out with his shirt in flames. It was held that he suffered injuries from the fire by accident arising out of his employment, and the court observes that even if it could be found that the fire was caused by his lighting a match, for the purpose of smoking, it would not prevent a recovery, since smoking was not forbidden.

"The procuring of food or other refreshment is recognized as essential to a workman, and he does not, as a matter of course, go outside of his employment where he leaves off active work to secure food or drink." L. R. A., N. S., 1916A, p. 58.

In *Gonyea v. Canadian Pac. Ry.*, 7 B. W. C. C., 1041, the court said at page 1045:

"The result of these cases [cited] would seem to be that, if any workman, during the hours of his employment, with the permission of his employers, ceases working for a short time for purposes of his own, the continuity of his employment is not thereby impaired."

An oft-cited case on questions arising from compensation acts

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is the case of *M'Lauchlan v. Anderson*, 4 B. W. C. C., 376, 48 Sc. L. R., 349. In that case it appears that a workman in the course of his employment was sitting on a wagon being drawn by a traction engine. He dropped his pipe, and, in attempting to recover it, fell and was injured. The Lord President said:

"He had a right to be at the place, riding on or walking beside the wagons; he was within the time during which he was employed, because the accident happened during the actual period of transit; and he was doing a thing which a man while working may reasonably do,—a workman of his sort may reasonably smoke, he may reasonably drop his pipe, and he may reasonably pick it up again."

In the case of *Earnshaw v. Lancashire & Y. R. Co.*, 5 W. C. C., 28, 115 L. T. Jour., 89, it was held that an employee in respondent's warehouse, who, with the knowledge of his employers, goes to a cabin upon the railroad's premises for tea, is not, while returning from the cabin, outside of his employment, and he is entitled to compensation for injuries received at that time.

In the case of *Morris v. Lambeth Borough Council*, 22 Times L. R., 22, it was held that an injury to a night watchman, caused by the falling of a shanty, into which he went to cook some food, because it was raining, may, in the absence of any prohibition against the use of the shanty, be considered as arising out of and in the course of his employment.

The procuring of food or other refreshments by an employee although personal in character is considered so far incidental to the employee's work that injuries received while procuring such food and refreshments may be found to arise out of and in the course of the employment, provided the employee acts in a reasonable and prudent manner, and the injuries occur while he is upon the employer's premises, or is subject as an employee to the employer's control. See *Borin's Case*, 227 Mass. 452 [116 N. E. 817], and cases there cited.

In the case of *Holland-St. Louis Sugar Co. v. Shraluka*, 64 Ind. App., 545 (116 N. E., 330), the court says at page 549:

"Such acts as are necessary to the life, comfort and convenience of the workman while at work, though personal to himself, and not technically acts of service, are incidental to the service; and an accident occurring in the performance of such acts is deemed to have arisen out of the employment."

In the case of *Dzikowska v. Superior Steel Co.*, 259 Pa. St., 578, the syllabus is as follows:

"Where an employee, during an intermission in his work, while waiting for material, struck a match for the purpose of lighting a cigarette and as a result his clothing, saturated with oil, by reason of the work in which he was engaged, caught on fire and he was fatally burned, an award of compensation to his dependents was properly made."

And in the opinion the court says:

"Nor do we regard the fact that the accident resulted from his striking a match for the purpose of enabling him to smoke at that time and place, as being sufficient to debar him and his dependents from the benefits of the statute. It is not unreasonable for workmen to smoke out of doors, during intervals of work, where it does not interfere with their duties."

See also case of *Whiting-Mead Commercial Co. v. Industrial Accident Commission*, 173 Pac., 1105.

The conclusion is that where a workman does such things as are usually and reasonably incidental to the work of the employer, including the taking of refreshments, rest and smoke, which are not forbidden by the employer, and, in so doing, is injured, it cannot be said as a matter of law that the injury was received outside the course of his employment.

Whether or not the injury occurred in the course of the employment is a question of fact, and if there is any evidence tending to show this fact it becomes a question for the jury to determine. It has been uniformly held that the Workmen's Compensation Law should be liberally construed to give effect to its beneficent purposes. We are, therefore, of opinion, upon reason and authority, supported by the cases above cited, that

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it was error for the trial court to say as a matter of law that there is no evidence of the injury complained of, or that the injury complained of was not received by the decedent in the course of his employment. The case should have been submitted to the jury. For this reason the judgment will be reversed and the cause remanded for a new trial.

SHOHL and CUSHING, JJ., concur.

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**THE DEFENSE OF INSANITY IN A PROSECUTION  
FOR HOMICIDE.**

Court of Appeals for Hamilton County.

**HAUSER v. STATE OF OHIO.\***

Decided, January 12, 1920.

*Criminal Law—Preponderance of Evidence Sufficient to Establish the Defense of Insanity—Charge of Court.*

A preponderance of the evidence is all that is required to establish the defense of insanity in a criminal prosecution. Therefore, when the language used in the charge indicates to the jury that more than a preponderance is required—that they must be satisfied by a preponderance or greater weight of the evidence, it imposes upon the defendant more than the law requires.

*M. F. Galvin*, for plaintiff in error.

*Louis H. Capelle*, Prosecuting Attorney, and *Louis Schneider*, Assistant Prosecuting Attorney, for defendant in error.

**HAMILTON, J.**

Heard on error.

The plaintiff in error, Albert Hauser, was indicted in Hamilton county for murder in the first degree for killing his

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\*Affirmed by the Supreme Court, December 6, 1920.

wife. Upon trial of the case he was convicted of murder in the first degree, with recommendation of mercy, on which verdict judgment of life imprisonment was imposed by the trial court, and from this judgment, proceeding in error is prosecuted to this court.

The specifications of error are: The verdict was against the weight of the evidence; insufficient evidence; the giving of special charges requested by the state; error in the admission of certain evidence; and misconduct of counsel for the state.

The first question which we will consider is raised by special charge No. 3, requested by the state, and given by the trial court, which charge is as follows:

"I charge you that the law presumes every man to be sane until the contrary is shown by sufficient evidence, and the law presumes further that a man possesses a sufficient degree of reason to be responsible for his crimes until the contrary is shown. Such proof in support of insanity must be affirmatively established by positive or circumstantial evidence *which must satisfy you that he was not sane*. Before you can find Albert Hauser was insane at the time he committed the crime with which he is charged, if you find that he did commit such crime, *you must be satisfied* by a preponderance or greater weight of the evidence, that at the time the act was committed, Albert Hauser was not capable of judging whether the act was right or wrong, or, that he didn't know at the time that it was an offense against the laws of God and man, that he was not a free agent in forming the purpose to kill."

This charge involves the question of the burden of proof where insanity is set up as a defense. Some authorities hold that while this burden rests upon the state, the presumption of sanity was sufficient to support this burden. However the greater weight of authority and the settled rule in Ohio is that the burden of proving insanity rests upon the defendant. (*State v. Austin*, 71 Ohio St., 317). If Hauser sustained this burden he could not be held responsible for the crime charged, and, as insanity was the only defense urged, the measure of the burden of proof is of prime importance, and if special charge No. 3 requested by the state imposed on him a greater

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burden than the law prescribes it was prejudicial error. The rule in Ohio is that to establish the defense of insanity a preponderance of the evidence is all that is required. It is, therefore, clear, if the language used in the charge indicated to the jury that more than a preponderance is required, that the charge would violate the rule of law and impose upon the defendant Hauser more than the law required. *Kelch v. State*, 55 Ohio St., 146, and *Sharkey v. State*, 4 C. C., 101, 2 Circ. Dec., 433, and cases cited.

In the case of *Kelch v. State*, *supra*, Judge Bradbury has collated and commented on the authorities of the different states relative to this question, and clearly lays down the rule. The language, "must *satisfy* you that he was not sane," "you must be *satisfied* by a preponderance or greater weight of the evidence," used in the charge in the instant case, contains in substance the language disapproved by the authorities above cited, and upon which a judgment of reversal was rendered.

In the case of *Kelch v. State*, the trial court in charging the jury said:

"It is not required, however, that this defense be established beyond a reasonable doubt; but it is sufficient if the jury is *reasonably satisfied* by the weight or preponderance of the evidence that the accused was insane at the time of the commission of the act. \* \* \*

"The proof must be such as to overcome the legal presumption of sanity; it must *satisfy* you that he was not sane."

And other language of similar import.

The court held that under this charge "it is not sufficient, \* \* \* that the fact of sanity be made probable, something more than that is required; the jury must be *satisfied* that it existed. To *satisfy* the mind according to the common notion of mankind is to free it from doubt; to set at rest."

We are of opinion that the language used in special charge No. 3 is not distinguishable in substance from the charge given in the case of *Kelch v. State*, *supra*, held to be prejudicial.

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For application of the rule in civil cases see *Cincinnati, H. & D. Ry. v. Frye*, 80 Ohio St., 289, and *Cincinnati Traction Co. v. Forrest*, 73 Ohio St., 1.

It is urged by defendant in error that while the language complained of may be subject to criticism, taking the charge as a whole, the jury could not have been misled thereby. But when we consider that practically the only defense offered is the question of insanity, and that the special charge given covered the whole question of the quantum of the proof to establish insanity, it must appear at once that the charge was prejudicial. Moreover, an erroneous special charge is not cured by a correct general charge. *Pittsburgh, C. & St. L. Ry. v. Krouse*, 30 Ohio St., 222.

Complaint is made of the conduct of the prosecuting attorney at the trial. The record does not disclose any objection or exception at the time to the conduct of the prosecutor. It is sought to raise the question by affidavits of counsel for defendant present at the trial. This does not properly raise the question and these assignments of error will not be considered. *Iron Co. v. Street*, 19 Ohio, 300; *Templeton v. Kraner*, 24 Ohio St., 554; *Fitzgerald v. Cross*, 30 Ohio St., 444; *State v. Young*, 77 Ohio St., 529, and *Berman v. State*, 16 C. C. (N. S.), 106, affirmed, 81 Ohio St., 508.

We have considered the other errors assigned, but do not find that they are prejudicial, and in view of the probable re-trial of the cause we will not comment on the weight of the evidence.

For error in giving special charge No. 3, requested by the state, the judgment will be reversed and the cause remanded for a new trial.

SHOHL and CUSHING, JJ., concur.

**PROSECUTION FOR BLACKMAIL.**

Court of Appeals for Cuyahoga County.

Judges Jones, Gorman and Hamilton, of the First Appellate District,  
sitting by designation in place of the Judges of the  
Eighth Appellate District.

**SMITH v. THE STATE OF OHIO.\***

Decided, January 16, 1918.

*Criminal Law—Sufficiency of Indictment for Blackmail—Allegation as to a Conspiracy—Testimony of Co-Conspirator Admissible—Conviction of One Defendant and not the Other Justifiable, When.*

1. An indictment for blackmail need not set forth that the threat or menace was to do an unlawful act or unlawful thing, but it is sufficient to charge therein that the threat or menace was to injure one in his property or reputation, or to humiliate him so that he might be induced thereby to give money rather than be subjected to a charge that might have a tendency to affect him, or to humiliate him, in his rights, his property or his reputation.
2. It is not necessary to allege a conspiracy in order to sustain a joint indictment for blackmail.
3. If the evidence establishes a conspiracy beyond a reasonable doubt, the testimony of one conspirator is admissible against his co-conspirator.
4. Where two are jointly indicted for blackmail, the fact that one defendant takes the stand in his own behalf and denies having uttered statements attributed to him while the other defendant remains silent, is sufficient to justify the jury in finding the former not guilty and the latter guilty.
5. Evidence of similar facts and circumstances is admissible to prove scienter, guilty knowledge or intent, but not for the purpose of proving guilt of the charge under trial.

*Payer, Winch, Rogers & Minshall*, for plaintiff in error.

*Samuel Doerfler*, Prosecuting Attorney, for defendant in error.

\* Motion for an order directing the Court of Appeals to certify its record in this case overruled April 2, 1918.

**BY THE COURT.****Heard on error.**

The plaintiff in error and John G. Owens were jointly indicted by the grand jury of Cuyahoga county on the charge of blackmail, under Section 13384, General Code. The substance of that

section which pertains to the indictment is as follows:

"Whoever, with menaces, orally \* \* \* demands of another \* \* \* money \* \* \* with intent to extort or gain from him \* \* \* money \* \* \* may be fined," etc.

The indictment, after the formal parts, sets out:

"In the name of and by the authority of the State of Ohio the Jurors of the Grand Jury do present and find that Charles B. Smith and John G. Owens, late of the county aforesaid, on or about the 1st day of December in the year of our Lord one thousand nine hundred and fifteen, with force and arms at the county aforesaid, with the following menaces, to-wit—by saying to one Frank A. Collins, then and there being: 'You know you have got a great big job here and you are bound to have more or less labor trouble on it. We like you and we like the Gill company, but in order to go down the line for you, it is asking a whole lot of us. I think that Kerm Gill ought to give in and give us a nice little Christmas present. It is going to take a couple of years to build it and we have got to go to the mat for you fellows, and we figure Kerm Gill ought to give us some money. We are afraid there is going to be trouble around here. If Kerm Gill wants to be that kind of a cheap skate, he can get out of this town. I want to tell you something, Frank, we are going to make this a regular town like New York and Chicago. We are letting you off mighty easy. We are only asking you two thousand dollars (\$2,000). It would have been a whole lot better for you to have had us along with you all through this big job than have us against you. We like you personally, Frank, but we are going to make Kerm Gill's firm live hard from now on,' did demand of the said Francis A. Collins and one Kermode F. Gill, money in the amount of two thousand dollars (\$2,000) with intent to extort from them, the said Francis A. Collins and Kermode F. Gill, money in the amount of two thousand dollars (\$2,000), contrary to the form of the statute in such case made and provided and against the peace and dignity of the State of Ohio."

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Both defendants pleaded "Not guilty" to the indictment. Thereafter the plea was withdrawn, and a motion to quash was filed, and overruled, and a demurrer to the indictment was filed and overruled. The accused thereupon renewed their pleas of "Not guilty." Trial was had, resulting in the conviction of Smith and the acquittal of Owens.

Error is prosecuted by Smith.

It is claimed by counsel for plaintiff in error that the indictment did not sufficiently set out any menace to extort money, because it fails to set out that plaintiff in error threatened Collins with an unlawful act.

It is not necessary that the threat or menace should be to do an unlawful act or unlawful thing. It is sufficient that the threat or menace be to injure one in his property or reputation, or to humiliate him so that he might be induced thereby to give money rather than be subjected to a charge that might have a tendency to affect him, or to humiliate him, in his rights, his property or his reputation.

It is further urged that the indictment does not charge a conspiracy, and inasmuch as it is a joint indictment it is necessary to charge that they conspired to extort money by menace and threat.

It is held by the Supreme Court in *Elliott v. The State*, 36 Ohio St., 318, at page 324, that the crime "may be committed by one or more persons, and for which they may be jointly indicted without alleging a previous conspiracy."

It was not therefore necessary to charge a conspiracy in order to have a joint indictment against Smith and Owens.

It is further urged that the testimony of one of these parties could not be used against the other. But the record discloses that whatever was said and done touching the matters set out in the indictment was done or said by one or the other when they were both present, and therefore the evidence of a conspiracy was produced to the jury, and it was a question of whether or not that evidence established a conspiracy beyond a reasonable doubt. If it did, and the jury were the judges whether or not it did, then the testimony of one was admissible against the other,

under the rule laid down in *Ditzler v. The State of Ohio*, 4 C. C., 551.

It is urged by plaintiff in error that the evidence was not sufficient to warrant the jury in returning a verdict against Smith in view of the fact that Owens was acquitted. It is urged that the evidence in the record does not show that the offense was proved against Smith beyond a reasonable doubt, and that it is not conceivable that Smith could be convicted and Owens acquitted on the same identical evidence.

Collins testified that Smith and Owens came to his office and demanded of him \$2,000. Owens was the spokesman, and this is the language that he used, as Collins testified:

" 'Frank, you have got a great big job here and you are bound to have more or less labor trouble on it. We like you and we like the Gill company. We like Kerm Gill, but we are going to have to go down the line for you. It is getting near Christmas and we think Kerm Gill ought to kick in with a Christmas present for us. You know how it is. We have got to do a whole lot for you to get your work over. I think he ought to kick in with a Christmas present for us.' I [Collins] said: 'Well, I will take it up with Mr. Gill and see what he says,' which I did."

Two or three days after, Owens and Smith again went to see Collins, and they had another talk with him. Collins testified that the following occurred:

"I had gotten fifty dollars from Mr. Robinson of The Guardian Bank, which I brought to them, and Mr. Smith remarked, 'Why,' he says, 'Jack and I spend more than that much every day,' very contemptuously. I said, 'Well, how much did you expect?' He said, 'Why, at least two thousand dollars.' I said, 'I don't know.' I said, 'I didn't think you wanted any amount like that. I will see them again and see what he says,' which I did."

Thereafter Collins testified that Smith and Owens again came to see him, in about a week, and this occurred between Collins and Smith and Owens:

"Q. Tell us what you said in that respect.

"A. I said they wouldn't give that much money. They

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thought fifty was all right. They wouldn't give that much. That's all there is to it. Mr. Smith said, 'Well, if Kerm Gill is that sort of a cheap skate he can get the hell out of Cleveland. He can't build in this town.'

"Mr. Payer: Who said that?

"The Witness: Mr. Smith. He said, 'Why, do you know how they settle jobs like this in New York and Chicago? They charge you one per cent. of the total contract. How much is your contract here?' Well,' I said, 'it will amount to about two and a half million.' 'Well,' he says, 'that is twenty-five thousand dollars, isn't it?' 'Now,' he says, 'I think we are letting you off mighty easy with two thousand dollars. If he wants to be a cheap skate he can get the hell out of Cleveland. He can't build in this town.' I said—

"Q. Did he say anything else? What did you say?

"A. No, they started out then, and Mr. Smith further remarked, 'Well, we will make you live hard from now on, Frank.' I immediately took up the remark and said, 'Charley, haven't I always been square with you?' He said, 'Yes, you have. We like you personally, but we are going to get Gill, and we are going to get him good.'

"Q. Anything else?

"A. No, they left then."

This is but a part of the evidence as to what took place between Smith and Owens, on the one hand, and Collins, on the other, but we think the evidence is sufficient to warrant the jury in finding that both Smith and Owens had endeavored to extort money from Collins, who was an employee of Gill, by threats and menaces.

But it is said that upon this evidence the jury should have found Owens guilty, as well as Smith, or, rather, having found Owens innocent they should also have returned a verdict of not guilty as to Smith.

It appears from the record that Owens took the witness stand on his own behalf and denied ever having uttered these statements attributed to him by Collins, and denied that he had asked Collins for two thousand dollars or any other sum; whereas Smith failed to testify in the case, and failed to deny the testimony of Collins as to his utterances. Under such a state of facts the jury might well have concluded that the state had

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failed to establish the guilt of Owens beyond a reasonable doubt; but, in the absence of any denial on the part of Smith, the evidence was sufficient to establish in the minds of the jury the guilt of Smith, beyond a reasonable doubt. This, we think, is sufficient to account for the fact that the jury returned a verdict of "guilty" against Smith and "not guilty" against Owens.

It is further claimed that the court erred in the admission of evidence of similar facts and circumstances. There was a great mass of testimony admitted, of instances in which Owens and Smith, or Smith alone, had received money from contractors and builders and owners of buildings in the city of Cleveland, covering a period of one or two years prior to the time of the indictment. Many of these cases were instances like those set out in the indictment, in which the contractor or owner of a building was threatened with disaster or strikes, or trouble, unless money was paid. Other instances showed that money was paid to avoid strikes and trouble, and in order to settle strikes and labor trouble, and we think that on the whole the court did not err in admitting evidence of this character. The court charged the jury that the purpose of admitting this evidence was to show scienter, guilty knowledge or intent, and that it could not be used for the purpose of establishing the guilt of the defendants upon the charge against them in this case; that even though they had been guilty of all these former and subsequent offenses, nevertheless, unless the evidence established beyond a reasonable doubt that they were guilty of the offense charged in the indictment, it would be the duty of the jury to acquit them. In thus charging the jury we find that the court committed no error.

A careful consideration of the entire record in the case fails to disclose any error prejudicial to the plaintiff in error which would warrant us in reversing this judgment of conviction. The plaintiff in error had a fair and impartial trial, ably defended by able counsel. The court's rulings during the trial were fair, impartial and just; and his charge to the jury, including the special charges, was fair and impartial, and substantial justice was done in this case.

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The judgment of the court of common pleas is therefore affirmed.

JONES, GORMAN and HAMILTON, JJ., concur.

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#### VENUE IN ACTIONS ON FIRE INSURANCE POLICIES.

BOND v. OHIO FARMERS' INSURANCE CO.

Court of Appeals for Lorain County.

Decided, October 6, 1919.

*Fire Insurance—County in Which Action May be Filed Against Company Not Limited to County in Which Action Arose.*

The provision of Section 11272, G. C., that "if such corporation is an insurance company, the action may be brought in the county wherein the cause of action or some part thereof arose," does not limit the venue of such action to a county in which the cause of action or some part thereof arose, and such companies may be sued as other corporations in any other county which comes within the general provisions of said section.

*Glitsch & Stack*, for plaintiffs in error.

*Frank Taggart and Stroup & Fauver*, for defendant in error.

Heard on error.

DUNLAP, P. J.

Error is prosecuted in this cause from the action of the court of common pleas of Lorain county, which sustained a demurrer to the petition of the plaintiff, the ground of the demurrer being that the court had no jurisdiction of the person of the defendant or of the subject matter.

It was alleged in the petition that the defendant issued a policy of insurance to the plaintiff, Lucy F. Bond, thereby insuring her against loss or damage by fire, covering certain property owned by her in Mercer county, Ohio, that the premises were destroyed, and that by reason thereof the defendant was

indebted to the plaintiff to the amount set forth in the petition.

As the property was located in Mercer county, and as this action was brought in Lorain county, it was claimed by the defendant, in support of the demurrer, that the court was without jurisdiction, as we have before stated. This contention was made under the statute, Sec. 11272, G. C. The question arises as to the proper interpretation of this statute, and whether or not service of summons made on an agent of the defendant in Lorain county required the defendant to answer in this action in said county.

To sustain this judgment, learned counsel for the defendant in error are of necessity driven to the claim and contention that the venue for a suit against an insurance company, under the legislation of Ohio, is limited to the county "where the cause of action or some part of it arose." It is claimed that unless the cause of action arose in such county the insurance company can not be sued in the county in which it is situated, or has or had its principal office, or has an office or agent, or in which a summons may be served upon the president, chairman or president of the board of directors or trustees, or other chief officer, even though Sec. 11272 allows suit to be brought against corporations in general in any county where one of those conditions prevails; that the necessary, prime and sole requisite is that the venue must be in the county where the cause of action or some part of it arose. This contention is based solely upon certain permissive words in the statute, which are as follows:

"If such corporation is an insurance company, the action *may* be brought in the county wherein the cause of action or some part thereof arose."

In our opinion, it is sufficient answer to this contention to point out the fact that if it were not for these permissive words in this section of the statute an Ohio insurance company could not be sued in the county where the cause of action or some part thereof arose, unless one of the situations presented by the preceding clauses of the section in question existed. That

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is to say, unless the corporation had in such county its principal office, or place of business, or had an office or agent, or unless the county was one in which a summons might be served upon the president, chairman or president of the board of directors or trustees, or other chief officer; and yet it is most apparent that it is desirable that such insurance company could be sued in the county where the cause of action or some part thereof arose, regardless of the co-existence of any one of these other conditions.

It is not necessary to give reasons why such a situation would be deemed desirable on the part of the Legislature. We will, however, mention the fact that the necessary witnesses in such a lawsuit would naturally be residents of such county. So we think it quite plain that the Legislature, realizing that even with all the generous provisions made for the securing of service upon insurance companies it had omitted to provide for a situation enabling suit to be brought in the county where the cause of action or part thereof arose, regardless of the co-existence of one of the other conditions enumerated, saw fit to remedy what it regarded as an obvious defect in the statute and added thereto these permissive words.

For us to now hold that this added provision limits the venue to the county where the cause of action arose, when there appears such excellent reason for regarding it only as furnishing an additional forum necessary for the speedy and convenient administration of justice, would, as we view it, be doing violence to the plain provisions of this section. There is no statutory rule of construction of which we are aware requiring us to wrench out of this statute the word "may" and substitute for it the word "must," and, indeed, we think we are positively prohibited from doing so by the careful and discriminating use of the words "must" and "may" in the different sections of the code relating to the venue of actions.

We hold that the venue of this suit is properly laid in Lorain county, and this judgment is reversed and remanded with instructions to overrule the demurrer to the petition.

Judgment reversed, and cause remanded.

VICKERY and WASHBURN, JJ., concur.

**ACTS FORBIDDEN BY THE CONSTITUTION BUT AS TO WHICH  
THE GENERAL ASSEMBLY HAS NOT ACTED.**

Court of Appeals for Jefferson County

**ABE HOFFRICHTER V. THE STATE OF OHIO.**

Decided, May 27, 1920.

*Mayor—Improper Statements by, not Prejudicial to a Defendant, When  
—One Accused of Keeping a Place Where Intoxicating Liquors are  
Sold not Entitled to a Jury—Effect of a Constitutional Declaration  
Making an Act Unlawful.*

1. Improper statements made by a mayor regarding the course he would pursue with persons brought before him charged with offenses will not be regarded as prejudicial in a case where on the undisputed evidence it was the duty of the mayor to convict.
2. In a prosecution under Section 13195, General Code, the defendant is not entitled to a trial by jury. *Inwood v. State* 42 O. S., 186, followed.
3. Section 9, Article 15, Constitution of Ohio in effect May 26th, 1919, forbids the sale of intoxicating liquors as a beverage. The sale of such liquors after that date was in violation of law, without regard to the fact whether the General Assembly had enacted legislation to enforce such provisions with penalties or not. It is not the penalty which makes the sale unlawful, but the fact that it is prohibited. Hence, keeping a place where intoxicating liquors were sold as a beverage after May 23th, 1919, is punishable under the provisions of Section 13195, General Code.

*Jay Paisley*, for plaintiff in error.

*Roy R. Carpenter and E. B. McMaster*, for defendant in error.

**METCALFE, J.**

The plaintiff in error was arrested upon a complaint made before the mayor of New Alexandria, charging him with keeping a place where intoxicating liquors were unlawfully sold in violation of law, and upon trial before the mayor was convicted.

The plaintiff urges the following errors. First, that the mayor was so prejudiced he could not give the plaintiff a fair trial. Second, that the mayor had no jurisdiction. Third, that the

\*Affirmed by the Supreme Court, February 15, 1921.

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plaintiff had the right of a trial by jury, and fourth, that there was no law in force making the sale of liquors unlawful within the state of Ohio at the time the alleged offense was committed, and consequently there could be no prosecution for keeping a place where liquors are sold contrary to law.

As to the first proposition, an affidavit was filed by the plaintiff in which, after stating the circumstances of his arrest, he avers that the mayor had stated in court at some time, not at the time he was upon trial, that persons who were brought before him and who pleaded "Guilty" would be fined \$300, and that those who stood trial would be fined \$500; thus, giving notice to those who were brought before him charged with a crime they would be convicted in any event, and if they stood trial that they would receive a much more severe punishment than if they pleaded "Guilty." Of course, this statement, if made, was exceedingly improper, and if there was anything in the record to show that that attitude of the mayor was carried into this case, it would reverse the case undoubtedly. But we do not find that it worked to the prejudice of the plaintiff, for upon the undisputed evidence in the case it was the duty of the mayor to convict him.

As to the question of the jurisdiction of the mayor to try this case without the intervention of a jury Section 4536 gives to the mayor authority co-extensive with the county, to try cases of misdemeanor where the penalty is by fine only.

In the case of *Inwood v. State*, 42 O. S., 186, the Supreme Court held in cases of prosecutions for misdemeanors where the punishment was by fine only that the defendant did not have a constitutional right to a trial by jury.

In *Cincinnati v. Steinkamp*, 54 O. S., 290, the case is cited with approval, and in *In re Kinsel*, 64 Kansas, 5; 56 Lawyer's Reports Annotated, 475, the case is discussed and followed.

The same question was before the Kansas court as in the Inwood case. The Inwood case is expressly followed in *State v. Smith*, 69 O. S., 196, and is cited as determining that question authoritatively in *State v. Borham*, 72 O. S., 358. So, we think that question is not an open question now.

The only remaining question in this case as to whether there was at law in force which made the sale of intoxicating liquors at the time the acts charged in this affidavit were committed, unlawful.

Section 13195 provides:

"Whoever keeps a place where intoxicating liquors are sold, furnished or given away in violation of law, shall be fined, etc."

This act is charged to have taken place on the 9th day of October, 1919, subsequent to the 26th day of May, 1919, when the Prohibition Amendment to our Constitution went into effect. It is insisted that by virtue of that amendment the existing laws relating to the sale of intoxicating liquors were repealed.

Section 9 of Article 15 is the section prohibiting the manufacture and sale of intoxicating liquors and reads as follows:

"The sale and manufacture for sale of intoxicating liquors as a beverage are hereby prohibited. The General Assembly shall enact laws to make this provision effective. Nothing herein contained shall prevent the manufacture or sale of such liquors for medicinal, industrial, scientific, sacramental, or other non-beverage purposes."

At the time that the acts charged in this affidavit were committed, it is said that there was no law in effect providing penalties for the sale of intoxicating liquor. No law has been passed that was effective, at least, to carry into effect the provisions of the prohibition amendment, and probably most of the legislation relating to the sale of intoxicating liquors which was upon the statute books, was repealed or at least became inoperative when the prohibition section went into effect.

But, would the constitutional amendment repeal a law which was not in any way obnoxious to any of its provisions? That section was in effect before the constitutional amendment was passed. But the amendment does not expressly or by implication repeal it. If it repealed any laws at all, it would be only such as were obnoxious to its provisions or such laws as it was designed to do away with like the various local option laws, but, would it repeal a law which imposed a penalty for keeping

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a place where intoxicating liquors were unlawfully sold? We think not.

It is insisted that the laws passed by the General Assembly at that time imposing penalties for sales of intoxicating liquors, were not in force, there could be no unlawful sale, and consequently the keeping of a place would not be unlawful; but does it follow that the sale of intoxicating liquors as a beverage was not unlawful because no penalty was attached to the act of selling it?

The sale is expressly prohibited by the Constitution itself; therefore, it is unlawful. It is true that no penalty attaches to the sale of intoxicating liquors until the Legislature has enacted laws which impose a penalty, but that makes no difference with the fact itself that the sale of intoxicating liquors was unlawful. It was unlawful because it was prohibited by the Constitution.

It is not the penalty itself that makes the sale unlawful, but it is unlawful because it is prohibited. The sale itself being unlawful, it follows that keeping a place where intoxicating liquors are sold as a beverage is keeping a place in violation of law, to-wit, in violation of the constitutional provision forbidding it.

Therefore, we think there is no prejudicial error in the record in this case and the judgment is affirmed.

Judgment affirmed.

**INFERENCE AS TO OWNERSHIP.**

Court of Appeals for Hamilton County.

BYRNES V. HEWSTON.\*

Decided, February 16, 1920.

*Negligence—By a Contractor in Leaving Blasting Caps Scattered About  
—With the Result that a Boy Exploded One and was Injured.*

1. In an action for personal injuries received by a boy about ten years of age, resulting from an explosion of blasting caps picked up by him in a field where the defendant contractor had had a camp six months previous, the evidence showing that the caps were scattered on the ground near where defendant's tool box had been placed and the defendant had used caps in blasting and that no other work of a similar character had been done in the neighborhood, the jury might properly infer that the caps were the property of the defendant and had been carelessly left by him or his servants in the field; although there was a conflict of testimony as to whether the caps used by defendant were of the same manufacture as those found by the boy, and defendant offered evidence of the careful manner in which he handled the caps used and that all not used there had been taken away.
2. Ordinary care requires that dangerous instrumentalities such as blasting caps should be cared for with the utmost caution.

*Frank E. Wood and Rogers & Headley*, for plaintiff in error.  
*Walter W. Clippinger and Thos. L. Michie*, for defendant in error.

HAMILTON, J.

Heard on error.

The action below was one for personal injuries received by Dana K. Hewston, a boy about ten years of age, as a result of the explosion of some blasting caps picked up by the boy in a pasture, where he had gone to drive home a cow. The boy took the caps home and not knowing their character, he put some of

\*Motion to require the Court of Appeals to certify its record in this case overruled by the Supreme Court, June 3, 1920.

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them on burning coals in the cook range. An explosion followed by which he was severely injured.

The defendant, Joseph A. Byrnes, is a contractor, and about six months prior to the injury had been engaged in making a road. He had used a number of men and teams, and had had a camp on the pasture land in question. During the progress of the work they had done some blasting and had used percussion caps to ignite the dynamite.

There was a conflict of testimony as to whether the caps which Byrnes had were of the same manufacture as those which the boys found. The defendant offered evidence to the effect that when the caps were purchased they were put in charge of one Dodds, the foreman, and placed in a small house on wheels, which served as his office and sleeping quarters; that on each day, when the blasting was done, the box containing the caps was returned to Dodds, who placed it under lock and key in the house wagon. After all the blasting was finished, defendant's witnesses testified, the box and the remaining caps were given to another contractor who took them away.

The court submitted to the jury the question of the negligence of the defendant below.

The jury rendered a verdict in favor of the plaintiff, upon which the court entered a judgment against the defendant, who now prosecutes error.

The principal error complained of is that the evidence is insufficient to support the verdict.

There is direct evidence that Byrnes' employes had been in the field where the caps were found, and that there had been a tool box near the place where the boys picked them up. There is evidence that there was no other work of a similar character being done in the neighborhood. The jury had a right to infer that these caps were the property of Byrnes, and had been carelessly left by him or his servants in the open field.

The real point of difference presented was one of fact—as to whether or not Byrnes was the owner of the caps and was responsible through his agents for the caps being in an exposed place.

The evidence is that some caps were found scattered on the ground near the tool box and were picked up by the boy, Hewston, but were taken by another boy. While the Hewston boy found the caps which caused the injury a little distance away, near the cow path, all the caps were found on grounds occupied as camping grounds by Byrnes' employes six months before.

The trial court submitted the case to the jury upon the theory that the defendant was liable only if he was negligent in the manner of keeping the caps in question, and no complaint is made of that charge. In this respect it was at least as favorable to the defendant below as the law required. The jury had a right to find from all the evidence that the caps which the boys picked up were those which had belonged to Byrnes. On the question of negligence in the manner of keeping the caps the authorities show that the fact that they found their way from the possession of the defendant and onto an open field, under circumstances like these here shown by the evidence, has a tendency to prove that a proper degree of care was not used in keeping them. Ordinary care requires that such dangerous instrumentalities should be cared for with the utmost caution, with a degree of caution in fact quite inconsistent with the idea of their being found lying loose upon the ground. *Eckart v. Kiel*, 123 Minn., 114 [143 N. W. 122], and *Mathis v. Granger Brick & Tile Co.*, 85 Wash., 634 [149 Pac. 3]. While the evidence offered on behalf of the defendant tended to an opposite conclusion, the jury were the sole judges of the credibility of the witnesses. Their conclusion, inconsistent with such testimony, is not necessarily contrary to law.

The judgment is affirmed.

SHOHL and CUSHING, JJ., concur.

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**AS TO WHETHER A HOUSE WHERE GUESTS ARE ENTERTAINED  
IS A PUBLIC INN.**

Court of Appeals for Cuyahoga County.

THE CENTRAL DISTRICT OF THE CHRISTIAN MISSIONARY  
ALLIANCE v. MERRILL.

Decided June 25, 1917.

*Inkeepers—Liability of for Valuables of Guests—Determination as to  
Whether a House Receiving Guests for Hire is an Inn—Maintain-  
ance of Safe for Valuables—Section 5981.*

1. Whether a house where a guest is entertained is a public inn or a private house, is a question of fact.
2. An establishment maintained by a Missionary Alliance, which consists of thirty rooms, to which reputable persons are admitted for hire, whether they be members of the association or not, and where they may obtain board for a day, week or month and where a register is kept, is a hotel, and said Alliance is liable to a guest for goods lost where it has not complied with the provisions of Section 5981, General Code, by maintaining a safe for the reception of valuables or by posting the required notice in the rooms.

*Carver & Thompson*, for plaintiff in error.*I. N. Loeser*, for defendant in error.

Heard on error.

LIEGHLEY, J.

The parties were in reverse order below and will be so mentioned here.

The defendant maintains an establishment at Beulah Park, consisting of thirty rooms, to which reputable persons are admitted for hire, whether they be members of the Alliance or not. The proof tends to show that an applicant may obtain board for a day, a week, or a month; that a register is kept; that there is no sign on the building; that on August 1, 1916, the plaintiff, a non-member, was received as a boarder or guest; and that on August 26, 1916, while she was absent from her room, jewelry and valuables were stolen therefrom by some intruder breaking the lock on the door. It is not claimed by the defendant that it complied with Section 5981, General Code, by maintaining a safe for the reception of valuables, or that notices were posted in the rooms as per said section.

The plaintiff filed her statement of claim in the municipal

court to recover from defendant the value of the goods stolen. A trial thereof resulted in a judgment for plaintiff, to reverse which judgment error is prosecuted to this court.

In the trial of the case below the defendant claimed that it maintained a boarding house only. The plaintiff claimed that the defendant at the time maintained a hotel. The trial of the case involved principally a determination of the question of whether or not the defendant kept a boarding house or was an innkeeper. From the proof we are not inclined to say that the trial court was wrong. The question whether a house where a guest is entertained is a public inn or a private house, is a question of fact. (*Beale on Innkeepers and Hotels*, Sections 13 and 14). For authority as to who is a guest, see *Arcade Hotel Co. v. Wiatt*, 44 Ohio St., 32.

The position maintained by the defendant having been determined to be wrong, the defendant became responsible for the safety of the personal possessions of the plaintiff left by her in her room while a guest of said hotel in the absence of any substantial or proven claim of negligence on her part. *Fuller v. Coats et al*, 18 Ohio St., 343, and *Praire Hotel Co. v. Medart*, 87 Ohio St., 130.

Judgment affirmed.

GRANT and CARPENTER, J.J., concur.

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**WHEN DEBTS MUST BE PAID FROM CORPUS OF ESTATE  
RATHER THAN FROM INCOME.**

HEGNER ET AL V. HEGNER, ADMR., DE BONIS NON.\*

Court of Appeals for Hamilton County.

Decided, April 30, 1917.

*Wills—Widow Given Income for Life—Debts and Expenses must be Paid from the Corpus—Widow Entitled to Year's Allowance Unless Will Otherwise Directs—Compensation of Executrix to be Calculated on Entire Estate.*

1. Where a will specifically gives the widow the income of all of testator's estate during her life, she is entitled to the income from the time of the testator's death, and debts of the testator and the

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\*Motion to require the Court of Appeals to certify its record in this case overruled by the Supreme Court, June 17, 1917.

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- expenses of administration must be paid from the corpus of the estate.
2. In such case, where the will does not otherwise expressly direct, the widow is entitled to receive the year's allowance provided by Section 10572, General Code.
  3. In determining the compensation to be paid an executrix the statutory commissions, as provided in Section 10337, General Code, are to be calculated upon the entire estate.

*Herman P. Goebel*, for plaintiffs in error.

*Bettinger, Schmitt & Kreis*, for defendant in error.

Heard on error.

JONES, P. J.

This case originated in the probate court upon exceptions to the account filed by the executrix in the settlement of the estate of Frank Messang, deceased. It was heard in the common pleas court on appeal, and this error proceeding was brought to review the judgment of the common pleas court disposing of said exceptions.

Four questions are presented by the record:

1. Whether the widow was entitled to receive the income of testator's estate from the date of his death, or whether part of that income, so far as was necessary, was to be used for the payment of testator's debts.
2. Whether the widow was entitled under the circumstances of the case to receive her year's allowance.
3. Whether the executrix was entitled to the statutory compensation charged in the account.
4. Whether the counsel fees paid to the attorney for the executrix were excessive.

Frank Messang's will contained the following items:

*First*: I desire that all my just debts and funeral expenses be paid by my hereinafter named executrix.

*"Second*: I give and bequeath to my beloved wife, Louise Messang the income of all my estate, real and personal, for and during her natural life.

*"Third*: Subject to said life estate and the power of sale as hereinafter set forth, I give, devise and bequeath all my property, the real estate in fee simple and the personal property absolutely, to my nieces and nephews, to-wit: Sallie Hegner Saemann, Lillie Hegner Sargent, Cora Hegner Sargent, Stella

Hegner, Frank Hegner, Walter Hegner, William Hegner and Lawrence Hegner, to be divided equally between them, or their heirs.

"*Fourth:* I hereby nominate my beloved wife, Louise Messang, as Executrix of this my last will and testament to serve without bond; and I hereby give her full power and authority to sell without order of court or application thereto, any or all of my property, at public or private sale, and on such terms as to her shall seem best, and to invest and re-invest the proceeds thereof, and in case of the sale of my real estate, to execute and deliver to the purchaser or purchasers proper deeds in fee simple therefor, and the purchaser shall in no case be required to look to the application of the purchase money."

1. The will specifically gives to the widow the income of all of testator's estate, real and personal, for and during her natural life. This bequest entitles her to the income from the time of testator's death.

Plaintiffs in error contend that because under the statute in force at the time of testator's death a settlement of the estate was not required until eighteen months from that date, the income of stocks and bonds should be accumulated by the executrix and used as a fund for the payment of debts, and the widow under the will was not entitled to receive any income until the debts had first been satisfied.

Such a construction would place upon the life-tenant the burden of the entire payment of the debts and costs of administration. This is contrary to the general rule, which is well stated in 40 Cyc., 1882, where numerous authorities in support are cited.

We think under the terms of the will the debts and expenses of administration should be paid out of the corpus of the estate, thus throwing the burden not only upon the remainderman but upon the life-tenant. The action of the probate court and the common pleas court in overruling this exception was correct; and in that respect the account and judgment are approved.

2. The will does not in any respect undertake to prevent the widow from receiving the year's allowance provided by Section 10572, General Code. The allowance was duly fixed in accordance with the statute at \$2,000. No exception has been taken to the amount as thus fixed, or to the method in which it was de-

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terminated, but it is contended that because provision was made for the widow by giving her the income of the entire estate it was unnecessary to add to that income for the purpose of her first year's support.

The case of *Collier v. Collier's Exrs.*, 3 Ohio St., 369, is conclusive to the effect that, where, as in this case, the will does not otherwise expressly direct, the widow is entitled to such an allowance. The lower courts were therefore right in overruling exceptions in that respect.

3. In fixing the compensation of the executrix, statutory commissions, as provided in Section 10837, General Code, were calculated upon the entire estate. It is objected to by plaintiffs in error, who contend that commission should be allowed only upon the amount of \$5,901.67, being the amount of cash received and disbursed, and that no commission should be allowed upon the stocks and bonds, on the ground that that portion of the estate had not been collected and accounted for by the executrix.

All of the estate had undoubtedly been collected, and, so far as the terms of the will permit, it was entirely accounted for by the executrix. It is true that the account shows that the stocks and bonds are retained by Louise Messang, executrix, the income of which is to go to her for life under item second of said will. This was a proper and complete settlement at that time. However, after the expiration of the life of Louise Messang it would become necessary—as appears from this record has now been done—that an administrator *de bonis non* with the will annexed should be appointed for the purpose of distributing this property to the remainderman entitled thereto under the terms of the will. To that extent, therefore, the estate of Frank Messang was not entirely settled by the filing of this final account.

As held by this court in *Bates, Admr., v. Creed*, 15 C. C. (N.S.), 433, at page 437:

"When, by reason of the death of the original executor or because of his resignation or removal, it becomes necessary to have an administrator *de bonis non* succeed him, or for any reason successive administrators are appointed to complete the administration of one estate, it is not intended that the costs of administration should thereby be increased, but the statutory commissions should be equitably apportioned between or divided among the

successive executors and administrators in proportion to the value of the services rendered by them, respectively, in such administration."

The same question was before the court of appeals of the sixth district in *Thurston v. Ludwig*, 25 C. C. (N.S.), 298, where the same ruling was made. In the opinion of the court in that case Judge Richards enters into a full discussion of the question, and supports the ruling by citation from other states.

Under this ruling the probate court made an allowance to Louise Messang for the statutory commission of \$1,000, leaving a balance of such statutory compensation, \$426.48 undisposed of to be used in meeting the expense of the subsequent administration of the estate by the administrator *de bonis non*. We think that this ruling of the probate court was proper, and to that extent the decision of the common pleas court in allowing the executrix the entire amount claimed in her final account was erroneous, and to that extent the judgment of the common pleas court should be modified.

4. The remaining question to be considered is whether \$1,200 the amount paid by the executrix to her attorney for legal services rendered in the settlement of this estate was or not excessive. It is contended by plaintiffs in error that this amount was excessive and unreasonable, and more than such services were fairly worth.

We have carefully considered the evidence contained in the record in this respect and find that, considering the services rendered and the fact that the estate inventories more than sixty-five thousand dollars, and that its settlement involved considerable time and attention, the amount allowed must be deemed fair and reasonable and not in excess of the value of the services to such estate. In that respect therefore the judgment of both the lower courts is approved.

The judgment of the court of common pleas is therefore affirmed, except in respect to the matter of the statutory compensation of the executrix, as to which the judgment of the probate court is approved rather than that of the court of common pleas.

Judgment accordingly.

GORMAN and HAMILTON, JJ., concur.

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**LIABILITY OF CITY FOR NEGLIGENCE OF A GARBAGE  
WAGON DRIVER.****Court of Appeals for Cuyahoga County.****SEBASTIANO RUSSO, ADMINISTRATOR OF THE ESTATE OF ROSARIO  
GALATI, DECEASED, v. THE CITY OF CLEVELAND.****Decided, February, 1920.**

*Wrongful Death—Liability of City Where Its Own Negligence was Admitted—But a Question was Injected as to Contributory Negligence of the Decedent.*

The driver of a city garbage wagon, while passing through an alley from west to east contrary to an existing ordinance, left his horse unhitched and unattended, which was also in violation of an ordinance in full force and effect, and while he was engaged in gathering up garbage the horse started and the wagon crushed decedent against a wall. *Held:*

It was for the jury to determine, under proper instructions, whether the admitted double violation of city ordinances was the proximate cause of the accident, and if so whether the decedent was guilty of contributory negligence of a kind that would prevent recovery; and a charge to the jury which ignored the fact that the conduct of the city was negligence *per se*, and left it to the jury to weigh the negligence of both parties, was prejudicial error and requires a reversal of the judgment.

*Gilbert Morgan, and B. D. Nicola, for plaintiff in error.  
James Cassidy, for defendant in error.*

**DUNLAP, P. J.**

In the common pleas court the plaintiff, as administrator sued the defendant, the city of Cleveland, for damages for wrongfully causing the death of plaintiff's decedent, Rosario Galati, caused as was claimed by the negligent act of the city of Cleveland, as set out in the petition.

The evidence tended to show that plaintiff's decedent was injured while pushing a cart in an easterly direction on an

alley called Parkman Court, in which alley the driveway, or paved portion upon which vehicles could pass, was only about eight feet wide, there being a sidewalk on each side of the same approximately two feet wide, slightly elevated above the roadway. As he was proceeding in this easterly direction a garbage wagon driven by an agent and servant of the city of Cleveland had just previously been driven up to a certain point in this alley and left standing there, the same having been driven from the west. The immediate cause of the accident was a movement of the horse drawing the wagon by which the cart was carried or moved in the direction the reverse from that in which it had come, and the plaintiff's decedent was crushed by the handle of the cart against a house bordering on said alley.

There is some dispute in the testimony as to whether plaintiff's decedent had pushed his cart so far that it had come in contact with some part of the wagon and had thus perhaps startled the horse and caused it to move forward, or whether he had stopped at some short distance from the wagon and from contact therewith, and was waiting for the driver of the wagon to return.

There is no dispute in the testimony, however, but that the horse attached to this garbage wagon was headed in a westerly direction, and that it had been driven in a westerly direction, which was contrary to a general ordinance of the city of Cleveland requiring vehicles using alleyways of that width to drive only east thereon; and there was no dispute in the testimony, in fact it was conceded by the driver of the garbage wagon that the horse was left unattended and unhitched, without anybody to take care of it while the driver went into a yard close by for the purpose of collecting garbage.

Ordinances of the city of Cleveland, admitted by the defendant to be existing and valid ordinances, were admitted, which are as follows:

Sec. 1267. "No person shall leave any horse or horses, whether attached or unattached, to any carriage, wagon, cab

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or other vehicle, standing on any street, lane, alley or public ground, unless said horse or horses be securely hitched or fastened, or unless the reins be in the hands of some person in charge of said horse or horses, or within his immediate reach, and it shall be unlawful to hitch or fasten any horse or other animal to any tree or shrub in any street, alley, public ground or public place in the city of Cleveland."

See. 1341. "The owner, operator, driver or person in charge of any cart, dray, wagon, etc., or other vehicle used, propelled or driven upon the streets of the city of Cleveland shall conform to and observe the following rules of the road upon all such streets, alleys, avenues and places in said city.

1. Vehicles shall be driven in a careful manner and with due regard for the safety and convenience of pedestrians and all other vehicles.

2. Vehicles shall keep to the right side of the street except when necessary to turn to the left in crossing or overtaking another vehicle.

3. Vehicles shall pass each other on the right."

Sec. 1343-H. (*Direction of traffic in alleys.*) "In all alleys where the driveway is less than twelve feet wide all vehicles must enter or pass over the same as follows: In those alleys running north and south the direction of the traffic shall be from north to south, and in those alleys running east and west the direction of the traffic shall be from east to west."

The violation, therefore, of at least two of the city's ordinances by one of its own employees driving this garbage wagon is undisputed, and must be regarded as a settled and determined fact in the case.

The question of whether or not the plaintiff was guilty of contributory negligence which proximately caused or contributed to cause his injury, was a proper question for solution by the jury as was also the question of whether or not the undisputed negligence of the city was the proximate cause of the death of plaintiff's decedent. The jury found in favor of the defendant, upon which finding judgment was entered, and this petition is filed seeking a reversal of this judgment.

It is claimed by the city that the death of plaintiff's decedent was not due to the accident, and that sufficient evidence is offered upon this question of fact to warrant the verdict of

the jury upon this theory alone. We unanimously and emphatically agree that this judgment can not be affirmed upon this theory. The evidence to our minds clearly shows that the death of plaintiff's decedent was due to the accident, and we have no hesitation in saying that such a finding on the part of the jury, if made, was manifestly against the weight of the evidence.

If this judgment is to be affirmed, it must be upon the theory that the jury was justified in finding that plaintiff was guilty of contributory negligence. Upon this point we recognize the fact that minds may differ. That question was a proper one for submission to the jury under a charge correctly stating the law, and we cannot say that in this respect the finding of the jury was manifestly against the weight of the evidence. Nevertheless we are of the opinion that the question of contributory negligence of the plaintiff was submitted to the jury under a charge that was misleading and erroneous and sufficiently prejudicial to warrant a reversal of this judgment. As we have before stated, the violation of the two ordinances by the defendant through its driver was undisputed and conceded, and by all the rules of evidence it became an admitted and determined fact in the case. It is not for the jury to determine in such a situation whether or not the conduct of the city through its driver is negligence. The law makes such conduct negligence *per se*, and makes it unnecessary for the jury to further find upon the question of the city's negligence.

A proper charge under the situation revealed by this case would in effect instruct the jury that the violation of said ordinances being admitted, the negligence of the city in this case is a conceded fact, and "so far as you are concerned you are to regard such negligence as proven. It is only for you to determine whether or not such negligence was the proximate cause of the injuries to plaintiff's decedent which caused his death, and the further question of whether or not plaintiff's decedent was guilty of contributory negligence."

It seems to us that these two questions are the only ques-

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tions in this case to be determined by the jury upon the question of liability. The court, however, charged:

"Now it is for you to decide in the light of this testimony whether or not the city was guilty of negligence. If it was, whether or not the plaintiff's decedent was also guilty of negligence or not."

This left it for the jury to conclude that the violation of an ordinance is to be excused, overlooked and condoned at its pleasure. It puts the jury upon a higher plane than the city council. It makes more or less of a farce out of the solemn passage of an ordinance and holds it to be a mere scrap of paper which may be regarded or disregarded at the whim or caprice of the minds of the men on a jury. The prejudice to plaintiff's rights here is most apparent, for it is easily conceivable that the jury reasoned that the mere leaving of a well-trained horse, such as the evidence showed this horse to be, unhitched upon the public street was not an act of negligence; that the happening of any serious result from such a natural course of conduct could hardly be anticipated; and inasmuch as the jury was given untrammeled license to so treat this act either as negligence or not as it deemed fit, it becomes quite natural to suppose that its verdict was reached rather from such considerations than from a consideration of the subject of the contributory negligence of plaintiff's decedent or the subject of proximate cause.

There are vices, we think also, in the hypothetical questions submitted to the expert witnesses for the city. Thus in the hypothetical question there is included the statement "he was dismissed from the hospital as cured and able to perform all necessary duties." The testimony of the only witness for the defendant who testified as to decedent's condition on leaving the hospital is best summed up in the words of this witness as found on page 165 of the record where the statement is made:

"He was considered in a condition fit to be discharged from the hospital. He got up himself out of bed, went to the toilet,

and he was able to perform all the things that a man convalescing needs to perform without assistance."

We do not want to be captious and do not reverse this cause because of the faulty hypothesis, realizing the discretionary power of the trial court, but our own opinion is that the hypothetical questions do not hew as closely to the line of fact as is at least desirable in a proper administration of justice. We reverse this case, however, for error in the charge of the court as indicated in this opinion.

Judgment reversed and remanded.

WASHBURN, J., concurs.

VICKERY, J.

Concurring in the view that the death of plaintiff's decedent was due to the accident, and concurring in the view that insofar as this judgment should be reversed as being against the weight of the evidence if the verdict of the jury was founded upon that theory; but does not concur in the view that the violation of the ordinance upon the part of the employee of the city was negligence *per se*, and for that reason dissents from the judgment.

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## JURISDICTION IN DIVORCE PROCEEDINGS.

Court of Appeals for Hamilton County.

SCHMID, BY ETC., v. SCHMID.

Decided, May 7, 1917.

*Divorce—Dismissal of Petition Without Hearing—Confers Jurisdiction on Error in the Court of Appeals—Proceedings may be Brought Either in County of Residence or County Where Cause of Action Arose, if in Ohio.*

1. The court of appeals has jurisdiction of a proceeding in error to review a judgment dismissing, without hearing, a petition for divorce on the ground of non-residence of the plaintiff.
2. Under Section 11980, General Code (106 O. L., 339), a plaintiff, who has been a resident of this state at least one year before filing the petition, may institute proceedings for divorce either in the county in which such plaintiff has been a *bona fide* resident for thirty days or in the county where the cause of action arose.

*Hicks & Hicks*, for plaintiff in error.

JONES, P. J.

Heard on error.

The original action was brought by Frank Schmid, by his father and next friend, Albert Schmid, against Amanda Schmid, as defendant, in the court of common pleas of Hamilton county, Ohio, division of domestic relations, for divorce, on the grounds of extreme cruelty and gross neglect of duty.

As amended the petition alleged that plaintiff was and had been a resident of the state of Ohio for more than one year, and of Clermont county for more than thirty days prior to the filing of the petition, and that the acts of which he complained occurred in the county of Hamilton and state of Ohio.

The defendant was personally served with summons and a copy of the petition. She filed no answer or demurrer, and

when the case came on for hearing she did not appear and was not represented by counsel. And the court of its own motion, upon the allegations of the petition, without having heard any evidence, entered judgment dismissing plaintiff's petition without a hearing, on the ground that the court had no jurisdiction of the action because the plaintiff was not a resident of Hamilton county.

This error proceeding was then filed to secure a reversal of that judgment.

In the case of *Pappalardo et al v. Pappalardo* (28 O. C. A., 449, 6 Ohio App., 291), decided by this court January 8, 1917, we had occasion to consider the jurisdiction of the court of appeals, under the present law, to review a decree of divorce granted by the court of common pleas, and we there held that a judgment granting a divorce is not subject to such review because contrary to public policy and the uniform decisions of our courts.

In the instant case, however, no decree for divorce was granted, nor was it refused, but the court refused to hear the case and dismissed the petition without a hearing, holding that it had no jurisdiction of the action for the reason that the petition disclosed that the plaintiff was not a resident of Hamilton county, but a resident of Clermont county, Ohio. The reasons for the refusal to entertain error proceedings in the *Pappalardo* case, therefore, do not obtain here, and this court has jurisdiction in this case. This by analogy is shown to be the policy of the law by the terms of Section 12002, General Code, which provides that no appeal shall be allowed from a judgment or order in divorce cases "except from an order dismissing the petition without final hearing." The change in Section 6, Article IV of the Constitution, defining the jurisdiction of the court of appeals, would not permit the hearing of the case on appeal *de novo*, but the fact that the section has not been repealed indicates the legislative intent that a review should be had where there has been no final hearing.

The statutes in relation to divorce and alimony are found in Title IV, Division VII, Chapter 3, containing Sections 11979

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to 12003, inclusive, General Code. Section 11980 now reads as follows:

"Except in an action for alimony alone, the plaintiff must have been a resident of the state at least one year before filing the petition. Actions for divorce or for alimony shall be brought in the county in which the plaintiff is and has been for at least thirty days immediately preceding the filing of the petition, a *bona fide* resident or in the county where the cause of action arose. The court shall hear and determine the case, whether the marriage took place, or the cause of divorce occurred, within or without the state."

By the terms of the above section, in order to bring an action in this county, the following requirements must appear in plaintiff's petition:

1. Plaintiff must have been a resident of the state at least one year before filing his petition.
2. The action shall be brought (a) in the county of which the plaintiff is, and has been for at least thirty days immediately preceding the filing of the petition, a *bona fide* resident; (b) or in the county where the cause of action arose.

The requirement as to thirty days residence in the county was inserted in the recent amendment of this section, found in 106 Ohio Laws, 339, but in other respects the wording of the section in the General Code is substantially the same as it appeared in Section 5690, Revised Statutes, and as it has stood for many years.

The language employed clearly provides that the action may be brought either in the county where the plaintiff resides or in the county where the cause of action arose. The meaning of the language is clear and without ambiguity. The use of the disjunctive "or" provides for an action in either county. To hold otherwise would be to eliminate an entire clause from the section, or to ignore the clear import of the words used. All rules of statutory construction require that a statute should be so construed as to give force and effect to every part of it.

The meaning of this section is so clear that is entirely unnecessary to consider the reason for its provisions. But it can

be readily seen that while it is usually a matter of convenience for a plaintiff to bring his action in the county of his residence, it might in some cases be much less expensive and more convenient to bring the action in the county where the cause of action arose and where the necessary witnesses reside and are available. These, however, are matters for the consideration of the Legislature; and, where the meaning is clear, as we find it to be in this provision, nothing remains but to follow the law as it is written.

The petition in this case contains all the necessary averments as to the jurisdiction, and the court below was clearly in error in refusing to hear the case.

Judgment reversed and cause remanded to the court below with instructions to hear and determine the case, and for such proceedings as may be authorized by law.

GORMAN and HAMILTON, JJ., concur.

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**UNLAWFUL MUNICIPAL AID TO A STREET RAILWAY COMPANY.****Court of Appeals for Hamilton County.****HARTH V. CITY OF CINCINNATI ET AL.\***

Decided, April 12, 1920.

*Constitutional Law—Statutory Provision for Replacement by Municipality of Worn Out Street Railway Tracks and Assessing the Cost Against the Company Invalid Because in Effect a Lending of the City's Credit.*

Sections 3812-2 and 3812-3, General Code (108 O. L., 215-218) which provide for the replacement or repair of worn out or defective rails, ties, etc., of street railway companies in streets of municipalities, when such streets are to be paved, repaired, improved, etc., and in case the railroad companies fail to do so authorize municipalities to make such replacements, repairs, etc., and to assess the cost against the railway companies, and issue bonds in anticipation of their collection, are invalid, being in contravention of Article VII, Section 6, of the Constitution of Ohio, which prohibits municipalities from raising money for or loaning their credit to any joint stock companies, corporations, or associations.

*Walter M. Schoenle*, for plaintiff.

*Saul Zielonka*, City Solicitor, and *William Jerome Kuertz*, Asst. City Solicitor, for defendants.

**HAMILTON, J.**

Heard on appeal.

The plaintiff, Edward J. Harth, as a taxpayer of the city of Cincinnati, Hamilton county, Ohio, on January 23, 1920, in writing, requested the city solicitor of Cincinnati to file proceedings in a court of competent jurisdiction to enjoin the defendants from proceeding further under the resolutions of the city council of Cincinnati, passed November 18, 1919, declaring the necessity of requiring the Cincinnati Street Railway Company

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\*Affirmed by the Supreme Court, June 22, 1920.

and the Cincinnati Traction Company to renew and replace rails, etc., along Freeman avenue, under the ordinances of the city of Cincinnati passed November 25, 1919, and December 23, 1919, being ordinance No. 344-1919 and ordinance No. 388-1919, and to enjoin the city auditor from delivering to the trustees of the sinking fund of the city of Cincinnati the assessment bonds for the improvement of Freeman avenue by the construction of rails, ties, roadbed and tracks, authorized under ordinance No. 388-1919, in the sum of \$60,800, which the board of sinking fund trustees had agreed to purchase.

The solicitor refused to bring the action requested, and the plaintiff as such taxpayer of said city brought the action on behalf of the city in the superior court of Cincinnati for purposes as stated in the above request to the city solicitor, and, by the petition, challenged the constitutionality of the statute of the state of Ohio passed April 17, 1919, found in 108 O. L., part 1, 215 to 218, inclusive, which is the authority for the ordinances and resolutions above referred to.

The defendants filed demurrers to the petition on the ground that the petition did not state facts sufficient to constitute a cause of action against them. The court below sustained the demurrers to the petition, and, the plaintiff not desiring to plead further, judgment was entered in favor of the defendants and the petition was dismissed. Thereupon, the plaintiff appealed the case to this court.

The question for determination involves the constitutional or provisions of the Constitution limiting or prohibiting an as April 17, 1919, and found in 108 O. L., 215.

In substance, this statute provides that where a municipality finds it necessary to improve a street by paving, repaving or resurfacing, and in said street there are located railroad rails, ties, roadbed or tracks of a street railway company, which rails, ties, roadbed or tracks have become worn out or defective, and, upon notice, the street railway company fails or refuses to renew, replace or reconstruct the rails, ties, roadbed or tracks in accordance with the plans and specifications furnished by the municipality, the municipality may proceed to make such

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reconstruction, and assess the costs thereof against said railway company; and, upon failure of the company to pay the assessment of the cost in cash, the municipality may, by ordinance, provide for the payment of said assessment in not to exceed ten annual installments with interest thereon, and bonds of the city may be issued in anticipation of collection of said installments. It is further provided that for any unpaid installments due after the expiration of the company's franchise the company shall not be liable, unless it continues to use the track or tracks after such franchise has terminated.

Council of the city of Cincinnati has proceeded under this statute by legislation to the point of issuing and delivering bonds of the city of Cincinnati in the sum of \$60,800, the estimated cost of the labor and material for replacing the rails, ties and tracks of the street railway company on Freeman avenue, Cincinnati, and the bonds have been accepted by the sinking fund trustees of the city, but delivery thereof has not been made.

The petition asks for an injunction against the delivery of the bonds and against further proceeding under and by virtue of said statutes and ordinances relating thereto.

Article 7, Sec. 6, of the Constitution of Ohio, provides:

"No laws shall be passed authorizing any county, city, town or township, by vote of its citizens, or otherwise, to become a stockholder in any joint stock company, corporation, or association whatever; or to raise money for, or to loan its credit to, or in aid of, any such company, corporation or association."

The question for determination is: Does the statute authorize a municipality to raise money for, or loan its credit to or in aid of a street railway company or companies? If so, it necessarily contravenes Art. 7, Section 6, of the Constitution of Ohio, and the statute and all proceedings thereunder would be invalid.

It is urged in defense of the statute that the purpose of the statute is to enable the municipality, while the street is undergoing improvement, to place the tracks, rails, etc., of the street railway company in good condition, thereby avoiding the frequent tearing up or damage to the street after the improvement

is made, and that by doing the work all at one time better results are obtained.

However laudable the motive may be it is not within the province of the court to consider the wisdom or laudability of a purpose, and these considerations can have nothing to do with the authority of a municipality to loan its credit, if it does so. "The constitution is the superior law and the ultimate criterion. The court's sole duty is to enforce it." *State v. Cincinnati St. Ry.*, 97 Ohio St., 283, 309.

Stripped of all verbiage and considered from the standpoint of legal interpretation only, we find this situation. Under authority of the statute in question the city notified the street railway company that on certain streets under improvement its rails, ties, tracks, etc., were worn out and defective; that the city had made all necessary surveys and estimates of the cost of replacing these tracks, rails and ties, both for labor and material; that if the railway company did not within the time named in the ordinance furnish the material and labor to replace the tracks, rails, ties, etc., the city would proceed to contract on its own responsibility to have this material furnished and work done; that when completed it would be the property of the railway company and the company would be given an opportunity to pay the cost thereof in cash, but if it did not do so the city would permit it to pay for the same in ten equal annual installments; that to raise the initial money to pay the costs of the construction to the contractor the city would issue its bonds, pledging the full faith and credit of the city to the payment of the bonds; and that the city would take a lien on all the property of the company to secure the payment of the installments as they should become due.

In effect the city further said to the street railway company that in case its franchise expired before all installments were paid it would be relieved from the further payment of any installments unless it continued to use the tracks after the franchise expired.

Under what guise or analysis of facts can it be claimed that this is not a furnishing of money or loaning of the credit of the

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city! It is not a part of the street improvement. If it were, this cost could be assessed upon the abutting property.

The assertion that it would give long life to the street by preventing the street car company from tearing up the tracks or laying defective materials only argues an excuse for the violation of an express inhibition of the constitution.

It is urged that the proceeding is authorized by the police power possessed by the municipality, but police power is only authorized for the benefit of the health, morals, and, perhaps, in some instances, safety of the people. Certainly the replacing of worn out rails and ties of the railway company can in no wise be construed as affecting the public health or morals of the community. The question of police power has no place in the consideration of this case.

If the statute in question were to be upheld as not violating the provisions of the constitution, then a statute providing that a municipality may at the time of the improvement of the street relay new gas pipes, new conduits, new water mains, if the water system is privately owned, and the issuing of bonds under such circumstances, would likewise be constitutional. And, if a municipality may do all these things under the present statute, or similar statutes, then it becomes at once apparent that the city may be furnishing the money or loaning its credit to the maintenance of all public utilities. This illustration is suggested to show where such statutes might lead, and brings the proposition to the very groundwork of the reason of the constitutional inhibition.

In the case of *Taylor v. Ross Co. (Comrs.)*, 23 Ohio St., 22, at page 83, the court says:

"Where public credit or money is furnished, to be used in part construction of a work, which, under the statute authorizing its construction, must be completed, if completed at all, by other parties out of their own means, who are to own or have the beneficial control and management of the work when completed, the public money or credit thus used, can only be regarded, within the meaning of the constitutional provision in question, as furnished for, or in aid of such parties."

While the main question in that case was a joint transaction, which is prohibited, the principle applying to the instant case is clearly stated. In this case the city is advancing the money to the contractor, and issuing its bonds, pledging the full faith and credit of the city to their payment, and when the work is completed the ownership is absolutely in the street railway company. The mandate of the constitution is that such aids shall never be authorized.

While it may not at first be apparent that the statute under consideration manifests an intent to authorize the municipality to raise money or to loan its credit directly, examination and reflection shows that it does so indirectly. It is axiomatic that what the General Assembly is prohibited from doing directly, it has not power to do indirectly. *Taylor v. Ross Co. (Comrs.)*, *supra*, and *Wyscaver v. Atkinson*, 37 Ohio St., 80.

The assessments contemplated and the bonds sought to be issued are not assessments for street improvements; but the proceeding is an attempt to assess or issue bonds of the city for the payment of the work and material for replacing, relaying and repairing worn out and defective rails, ties and tracks, the private property of the street railway company. This we hold to be raising money for or loaning its credit to the street railway company, which is prohibited by Art. 7, Sec. 6, of the Constitution of Ohio. We, therefore, hold that supplementary Secs. 3812-2 and 3812-3, G. C., of Ohio, reported in 108 O. L., 215, passed April 17, 1919, contravene Art. 7, Sec. 6, of the Constitution of Ohio, and are therefore invalid, and that all proceedings conducted by the city under and by virtue of the authority contained in said statutes are void.

A perpetual injunction will be granted.

SHOHL, J., concurs.

CUSHING, J., dissenting. I do not concur in the opinion of the majority of the court. Their determination of the case is based solely on a consideration of Art. 7, Sec. 6, of the Constitution, and an extract from the opinion in the case of *Taylor*

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v. *Ross Co. (Comrs.)*, 23 Ohio St., 22, at page 83. They have not considered Art. 13, Sec. 6, relating to the powers of cities in assessment cases.

The facts in *Taylor v. Ross Co. (Comrs.)*, *supra*, were that a statute authorized a county, township or municipality to levy taxes not above a given per cent. on the taxable property of the locality, for the purpose of building so much of a railroad as can be built for that amount, and it was in fact a gift to the railroad company.

The questions that have been litigated under Art. 8, Sec. 6, of the Constitution, have been the use of money or credit of the municipality in private enterprises for profit, or as bonuses. These are both clearly prohibited.

In the case of *State v. Cincinnati Street Railway Co.*, 97 Ohio St., 283, 303, the court in its opinion quotes with approval from *Walker v. Cincinnati*, 21 Ohio St., 14, 54:

"The mischief which this section interdicts is a business partnership between a municipality or subdivision of the state, and individuals or private corporations or associations. It forbids the union of public and private capital or credit in any enterprise whatever. In no project originated by individuals, whether associated or otherwise, with a view to gain, are the municipal bodies named permitted to participate in such manner as to incur pecuniary expense or liability. They may neither become stockholders nor furnish money or credit for the benefit of the parties interested therein."

Justice Brewer delivering the opinion of the court in *Pleasant Township v. Aetna Life Ins. Co.*, 138 U. S., 67, at page 75 (34 L. Ed., 864), approves the language of the Supreme Court of Ohio in *Walker v. Cincinnati*, *supra*. At page 69 he says:

"This provision was inserted in the constitution, and adopted by the people, in view of the fact then and since well known in the history of all states, particularly in the West, that municipal bonds to aid railroads were freely voted in expectation of large resulting benefits—an expectation frequently disappointed. It was a declaration of the deliberate judgment of the people of Ohio that public aid to such *quasi* public enterprises was unwise, and should be stopped."

In case the city is empowered to construct a completed street for the convenience of the public, for travel by vehicle and street car, it proposes to charge the part of the cost it has determined is for the benefit of the railway companies to them.

It is claimed by the city that the statutes and ordinances are within the provision of the Constitution authorizing it to make improvements and levy assessments to pay for them, and that the necessity for an improvement and the authority to levy assessments to pay for it are by the Constitution vested in the legislative branch of the government and can not be interfered with by a court.

In *Scovil v. Cleveland*, 1 Ohio St., 126, Judge Ranney, at page 137, quotes from the opinion of Chief Justice Marshall in *Providence Bank v. Billings*, 29 U. S. (4 Pet.), 514 (7 L. Ed., 939).

"The power of legislation, and consequently of taxation, operates on all the persons and property belonging to the body politic. \* \* \* This vital power may be abused, but the interest, wisdom and justice of the representative body, and its relations with its constituents, furnish the only security against unjust and excessive taxation, as well as against unwise legislation."

In *Hill v. Higdon*, 5 Ohio St., 243, Judge Ranney, in passing on the authority of the legislative body to levy or authorize assessments, says at page 244:

"The subject is very important in its practical bearings, and not without serious difficulty; and for myself I am bound to admit, that the doubts which I at first entertained have not been entirely removed. But it is not upon *doubts* that this case is to be decided. The question can only be solved by a construction of several provisions of the constitution; and a proper construction can only be given, when the *intention* of those who framed and adopted that instrument is ascertained. We are bound to presume that the General Assembly have continued to pass laws, conferring this authority, upon a settled conviction of their power to do so; and it is only when a *clear* incompatibility between the constitution and the law is made to appear, that the courts are authorized to interfere."

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In *Parsons v. Columbus*, 50 Ohio St., 460, 467, Judge Minshall quotes with approval the following language:

"This obviously enjoins upon the legislature the duty of providing suitable and proper restrictions upon the enumerated powers; but in what these restrictions shall consist, and how they shall be imposed, are subjects left to the discretion or sense of duty of the legislative department, with the exercise of which the courts can not interfere."

In *Walker v. Cincinnati*, 21 Ohio St., 14, the fifth proposition of the syllabus is:

"The authority and duty to prevent an abuse of the powers of taxation and assessment by municipal corporations, is entrusted by the Constitution to the General Assembly, and not to the courts of the state. And the power of the legislature to authorize local taxation can not be judicially denied on the ground that the purpose for which it is exercised is not local, unless the absence of all special local interest is clearly apparent."

The question in this case, as I understand it, is whether the statute and ordinance amount to loaning credit under Art. 7, Sec. 6, or to an assessment proceeding under Art. 13, Sec. 6, of the Constitution.

Article 13, Sec. 6, is as follows:

"The General Assembly shall provide for the organization of cities, and incorporated villages, by general laws, and restrict their power of taxation, assessment, borrowing money, contracting debts and loaning their credit, so as to prevent the abuse of such power."

In addition to authorizing the organization of cities, it directs the legislature to pass laws restricting their powers of taxation, assessment, borrowing money, contracting debts and loaning their credit.

Loaning credit, used in this provision of the Constitution, must be in connection with the powers granted—among them levying assessments. Assessments shall be levied when the coun-

cil shall have declared that the improvement is conducive to the public convenience or welfare. Sec. 3812, G. C.

Heretofore assessments have only been levied on real property abutting the improvement. I have not found any cases, or provisions of the constitution limiting or prohibiting an assessment on property within the municipality, particularly when it has been benefited by the improvement.

A consideration of the apparent conflict in the use of the words "loaning credit" in Art. 7, Sec. 6, and Art. 13, Section 6, leads to the conclusion that they are not in conflict.

Article 7, Sec. 6, is a general provision limiting the power of the legislature in its enactment of laws.

Art. 13, Sec. 6, is special, being limited to subjects specified —among them that of assessments.

It is the law that all provisions of an instrument, if they can, must be given effect, and where two provisions of a constitution are in conflict, one being general and the other special, and the special relates to a particular subject or subjects, its provisions are to control over the general provision.

Judge Shauck in delivering the opinion of the court in *Akron v. Roth*, 88 Ohio St., 456, 461, says:

"The rule is that special provisions relating to a subject will control general provisions in which, but for special provisions, the subject might be regarded as embraced."

In *People v. Metz*, 193 N. Y., 148, 149, 157 (24 L. R. A., 201n), the court said:

"In construing a constitution all its provisions relating directly or indirectly to the same subject must be read together and any amendment in conflict with prior provisions must control, as it is the latest expression of the people."

This case is cited in *People v. Cassidy*, 50 Col., at page 520. Judge Shaw in *Mascolo, In re*, 25 Cal. App., 92, says:

"A construction which raises a conflict between parts of a constitution is inadmissible when by any reasonable interpretation they may be made to harmonize, and in case of irreconcil-

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able repugnancy the provision last in order of time should prevail."

In *Hoag v. Washington-Oregon Corp.*, 75 Ore., 588, 613, the court says:

"It is a familiar rule of construction that, where two provisions of a written constitution are repugnant to each other, that which is last in order of time and in local position is to be preferred."

There is no question but that the proper construction of streets, including railway tracks, is for the welfare of the public. It saves the expense to the property owners and taxpayers of frequent repair and resurfacing of streets. The convenience of the public is promoted by having streets and car tracks suitable for rapid transit. The determination of the question of public welfare and convenience is vested in the legislative branch of the government.

The conclusions deducible from decided cases and the considerations stated are that the legislation in question is within the purview of Art. 13, Sec. 6, of the Constitution, and that that section governs; that the convenience of the public, the wisdom and justice of such legislation, rest in the legislative branch of the government, with which the judicial branch may not interfere; that the legislation here complained of is not clearly in violation of constitutional prohibition, and must therefore be upheld.

**FORFEITURE OF CHECK OF BIDDER WHO FAILED TO  
EXECUTE CONTRACT.**

Court of Appeals for Meigs County.

**THE VILLAGE OF POMEROY, ETC., v. W. H. RINGWALD ET AL.**

Decided, March 10, 1920.

*Municipal Corporations—Check Deposited by Bidder as a Guaranty of Good Faith—Forfeited for Failure to Enter into the Contract Awarded to Him.*

When a municipality accepts the bid of a contractor whose bid was accompanied by a certified check in compliance with Section 4222 and the contractor fails to enter into the contract within the time required, the municipality is authorized to collect the amount of the check for its use and benefit.

*H. C. Fish*, for plaintiff in error.

*Russell & People*, for defendants in error.

**SAYRE, J.**

Heard on error.

This is an action by defendants in error to recover two hundred and fifty dollars, the amount of a certified check which accompanied their bid for street paving in Pomeroy. The bid was accepted by the council, but defendants failed to enter into the contract and execute a bond within ten days, as required by the instructions to bidders, and the contract was subsequently awarded to another. The check was cashed by the village and the proceeds thereof passed to its treasury. The records of the council are silent as to any forfeiture by the council of the money evidenced by the certified check.

The statute, Section 4222, provides that:

"Each such bid shall contain the full name of every person or company interested in it and shall be accompanied by a sufficient bond or certified check on a solvent bank, that if the bid is accepted a contract will be entered into and the performance of it properly secured \* \* \*."

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The notice to the contractors contained the provision that:

"Each bid must be accompanied by a certified check in the sum of \$250.00 as a guaranty that if said bid is accepted a contract will be entered into and its performance properly secured."

The "instructions to bidders," which were made part of the plans and specifications and to which the bid of defendants in error was attached, contained the following language:

"The bond shall be for an amount equal to the amount of the bid. Or the bidder may, at his option, file with the clerk a certified check for the sum of three hundred dollars, the same to be payable to the village if the bidder fails to enter into contract within ten days after the acceptance of his bid by the council."

The notice to the contractors provides that the check shall be a guaranty that the contract will be entered into and its performance properly secured, and the "instructions to bidders" provides that the check shall be payable to the village if the bidder fails to enter into the contract.

So, if the village was authorized by the statute to make the certified check such guaranty, and payable to the village in case the bidder failed to enter into the contract, then the contention of the plaintiff in error must be upheld.

It will be observed that the statute is silent as to what shall be done with the certified check if the contract is not entered into. But certainly the Legislature never intended that the furnishing of the certified check should be a meaningless performance. The purpose of the bond or check required by Section 4222 is to compel the bidder to enter into the contract if his bid is accepted or lose the amount thereof if he fails or refuses to do so. Further, it is to compensate the municipality, to some extent at least, for loss of time required to again advertise if that is necessary, for the expense of advertising and by being required, possibly, to pay a greater sum for the work to be performed. The amount of the bond or check stands as liquidated damages for the loss sustained by the village. The council by fixing the amount beforehand, and the bidder by his

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making a bid, have fixed a definite sum as damages for the failure on the part of the bidder to enter into the contract. *Wheaton B. & L. Co. v. City of Boston* (Mass.), 90 N. E. 559. McQuillen on Municipal Corporations, section 1221.

The fact that the council has not passed any ordinance formally forfeiting the amount of the certified check is not a defense, as it seems to us. By its refusal to pay over the money there is an actual forfeiture, and this is sufficient.

The judgment will be reversed and a judgment may be entered in favor of the plaintiff in error.

Judgment reversed.

WALTERS and MIDDLETON, JJ., concur.

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#### DUTY OF MOTORMAN TO STOP TO BE DETERMINED FROM THE CIRCUMSTANCES.

Court of Appeals for Hamilton County.

CINCINNATI TRACTION CO. V. CAHILL, ADMR.\*

Decided, April 19, 1920.

*Street Railways—Motorman to be Guided by Ordinary Prudence—In Deciding whether Danger Portends and the Car Should be Stopped—Charge of Court in an Action for Death of a Child Struck by a Car.*

In an action for damages for the wrongful death of a child who ran across a street in front of a car, between crossings, it is error to charge "If the jury believe from the evidence that the motorman on defendant's car which killed Albert Cahill as alleged in the petition and admitted in the answer, was running said car at a high and excessive rate of speed, under the circumstances then prevailing on Harris avenue, when he did see or ought to have seen him in time to stop said car before it hit him, and he did not do so, then the said motorman was guilty of negligence and the defendant is liable." A motorman is not required to stop unless he is aware of

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\*Motion to direct the Court of Appeals to certify its record in this case overruled by the Supreme Court, June 28, 1920.

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something which would lead a person of ordinary care and prudence to believe that failure to stop would cause injury.

*Rogers & Headley*, for plaintiff in error.

*Crosley & Rogers*, for defendant in error.

BY THE COURT.

Heard on error.

The defendant in error brought an action in the court of common pleas against the Cincinnati Traction Company for negligently causing the death of Albert Cahill.

The defendant in its answer admitted that one of its cars ran over and killed the boy, but denied all other allegations of the petition. This put at issue the averments of negligence, including the charge of excessive speed, failure to give warning by sounding a bell, or otherwise, and failure to maintain the proper lookout for pedestrians who might be crossing the street. The case was tried to a jury, and a verdict for the plaintiff for \$1,500 was rendered. To the judgment on this verdict, the defendant prosecutes error.

The record shows that the plaintiff's intestate, a four year old boy, had crossed the street in the middle of the block to sell some pieces of metal to a junk dealer, whose wagon was almost opposite his home. The street at this point was 40 feet wide. The distance from the south rail to the curb was 14 feet. The boy was at the wagon as the car approached it. As he ran back across the street toward his home, he was struck and killed by the car.

The contention of the defense was that the accident was unavoidable, and that the boy suddenly and unexpectedly came into the path of the oncoming car when it was at such distance that the motorman was unable to avert the injury.

Several specifications of error are relied upon.

At the request of plaintiff below the court gave several charges.

Plaintiff's special charge No. 1 was as follows:

"If the jury believe from the evidence that the motorman on the defendant's car which killed Albert Cahill as alleged in

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the petition and admitted in the answer, was running said car at a high and excessive rate of speed, under the circumstances and conditions then prevailing, on Harris Avenue, when he did see, or ought to have seen him in time to stop said car before it hit him, and he did not do so, then the said motorman was guilty of negligence and the defendant is liable."

A motorman is only required to stop his car when he sees a person in the vicinity, if there is something that should lead a person of ordinary care and prudence to believe that failure to stop the car would cause injury: The statement of law in the charge given would require the motorman to stop without regard to whether there was anything in the circumstances that would or should cause him to expect someone to come in the path of the car. The cause falls within the rule stated in *Cincinnati Traction Co. v. Simon*, 3 C. C. (N. S.), 515. This error concerns the vital issue in the case and necessitates a new trial.

The court was not warranted in stopping counsel in the making of an argument which careful analysis shows was not improper; but under all the circumstances this ruling alone would not appear to have been so prejudicial as to require a reversal of the case.

We have examined the other errors assigned, but find them not well taken.

The judgment will be reversed and the cause remanded for a new trial.

SHOHL, HAMILTON and CUSHING, JJ., concur.

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**GUARD RAILS ON THE APPROACHES TO COUNTY BRIDGES.****Court of Appeals for Lawrence County.****H. L. HARRIGAN, ADMR., v. THE BOARD OF COUNTY COMMISSIONERS IN AND FOR LAWRENCE COUNTY, OHIO.****Decided, June 25, 1919.**

*County Commissioners—Duty of with Reference to Providing Guard Rails—For Approaches to Certain County Bridges—Purpose of Such Rails—Province of the State Highway Department—Liability for Accident.*

1. The principal purpose of requiring guard rails to be erected at the ends of certain county bridges and on each side of the approaches thereto, as required by Section 7563, is to warn drivers of the location of danger.
2. The duty enjoined on county commissioners by the provisions of such sections was not relieved by the passage of the State Highway law (105-106 O. L., p. 623-666) or any later amendment thereof.

*Johnson & Jones and Daugherty & Riggs*, for plaintiff in error.  
*T. A. Jenkins*, Prosecuting Attorney, and *Andrews & Irish*, for defendant in error.

**SAYRE, J.**

Heard on error.

April 16, 1917, plaintiff's decedent lost her life by the falling of an automobile, in which she was riding, from a county bridge over Lick Creek, about five miles above Ironton, near the Ohio River. The negligence complained of was the failure of the county commissioners to erect guard rails along the approach to and at the end of the bridge.

There were no guard rails erected on the approach to the bridge where the accident happened. One witness testified that the car ran off the approach to the bridge, but the overwhelming weight of the evidence was that it ran on the upper chord of

the bridge and fell from there about eighteen or twenty feet to the bank of the stream. There was evidence tending to show that state aid was used in the improvement of the road from the floor of the bridge for a distance toward Ironton, and that it was at the date of the accident a state road and under state control, being an inter-county highway and main market road.

The trial court directed a verdict in favor of the defendant at the close of all the evidence.

There were five defenses: The first was, the accident was not caused by the lack of guard rails upon the approach to the bridge, as the car ran off the bridge and not off the approach; the second was, that if guard rails had been erected, or a hedge fence grown as provided in Section 7564, that would not have prevented the accident because of the excessive speed of the automobile; the third was, that as the State Highway Department has control and the duty to repair and maintain the road the defendant, the board of county commissioners, is not liable; the fourth was, that the driver was intoxicated, with the assent and procurement of plaintiff's decedent; the fifth was, defective lights, known to plaintiff's decedent.

Section 7563 reads as follows:

"The board of county commissioners shall erect or cause to be erected and maintained where not already done, one or more guard rails on each end of a county bridge, viaduct or culvert more than five feet high. They shall also erect or cause to be erected, where not already done, one or more guard rails on each side of every approach to a county bridge, viaduct or culvert if the approach or embankment is more than six feet high. \* \* \*"

Section 7564 provides:

"It shall be a sufficient compliance with the provisions of the next preceding section if the county commissioners shall cause to be erected and maintained, a good stock-proof hedge fence where a guard rail is required. Such guard rails or hedge fence shall be erected in a substantial manner, having sufficient strength to serve a protection to life and property, the expense thereof to be paid out of the county bridge fund."

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Section 7565 makes the county liable for injury resulting from a failure to comply with these provisions.

The defense, that as the car ran off or dropped off the bridge and not off the approach the county is not liable, would be complete if the sole purpose of guard rails or hedge fences was as a permanent buffer intended to hold back wagons, carriages or automobiles from going over the embankment when such vehicles come in actual contact with the guard rails or hedge fences. But it seems to us that one of the principal purposes of guard rails is to warn drivers of exact point of danger so that they may know where to drive to avoid it, just as a lighthouse warns of danger near it. The driver in this case testified that he did not know that he was near the bridge until he was on it, but thought that the curve was only a curve in the road. Now guard rails might have warned him of the nearness of the embankment, and with that knowledge he might have kept further to the right and avoided the injury. So we hold that the court could not say, as a matter of law, because the car fell from the upper chord of the bridge that the defendant was not liable. Whether the accident was caused by the drunkenness of the driver, assented to and procured by plaintiff's decedent; whether to defective lights, of which plaintiff's decedent had knowledge, and notwithstanding continued on the journey; whether by the speed of the automobile, or by the absence of guard rails, were questions for the jury.

It is contended that since the road has come under the control of the State Highway Department the county commissioners were relieved of their duty to comply with Sections 7563 and 7564. However, these sections have not been expressly repealed and if they are now superseded by the State Highway law it is because they are inconsistent with such law. The following is the last section of the act of June 5, 1915 (105-106 O. L., p. 666):

"This act shall supersede all acts and parts of acts not herein expressly repealed, which are inconsistent herewith \* \* \*."

Section 7464 provides that inter-county highways and main

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market roads constructed by the state, or taken over by it, shall be maintained by the State Highway Department.

Section 7465 provides that under certain conditions county and township roads may become state roads.

Section 1178 provides:

"There shall be a state highway department for the purpose of affording instruction, assistance and co-operation in the construction, improvement, maintenance and repair of the public roads and bridges of the state \* \* \*."

These sections, and others, show that the Legislature intended to create a State Highway Department and give it control over certain highways for the construction, improvement, maintenance and repair of the same. But our attention has not been called to any provision, nor have we found any, which makes it the duty of the State Highway Department to erect guard rails. If by the State Highway law the duty to erect guard rails had been placed on the Highway Department then there would have been an inconsistency between its provisions and the provisions of Sections 7563 and 7564, and the former would supersede the latter. But we can see no inconsistency between a law which confers authority upon the officers of a department to construct, improve, maintain and repair certain roads and a law which directs other officers to erect guard rails on the approaches and ends of bridges. The Legislature may have concluded that since it was the duty of county commissioners to erect guard rails, where required, at all other bridges in the county it might remain their duty to place guard rails, where required, at bridges on roads under state control.

Besides, the Legislature may have considered, in enacting the State Highway law, that to put the duty of erecting guard rails on the State Highway Department would be virtually eliminating a right of action for injuries where one should exist, and left the duty and liability remain.

The judgment of the court of common pleas will be reversed, and the cause remanded to that court for a new trial.

Judgment reversed.

MIDDLETON and WALTERS, JJ., concur.

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**HABEAS CORPUS DOES NOT LIE TO SECURE RELEASE  
OF A DEPENDENT CHILD.**

Court of Appeals for Hamilton County.

**BLEIER v. CROUSE, SUPT.**

Decided, January 28, 1920.

*Dependent Child—Jurisdiction of the Juvenile Court—Citation to Parent not Necessary—Remedy of Parent—Habeas Corpus does not Lie.*

1. Service of citation upon the parent of a child in a proceeding under Sections 1647 and 1648, General Code, is not a condition precedent to jurisdiction over the child.
2. Such parent, who has not been cited, must seek his remedy in the first instance in the juvenile court of which such child is a ward.
3. An action in habeas corpus in the court of common pleas can not be maintained to secure the custody of a child committed by the juvenile court.

*W. F. Fox, for plaintiff in error.*

*John C. Hermann, for defendant in error.*

**SHOHL, P. J.**

Heard on error.

This is a proceeding in error to review the judgment of the court of common pleas in dismissing a petition in *habeas corpus*.

The action was brought by Charles Bleier, who alleges that he is the father of three minor children, under the age of sixteen years, seeking to regain their custody from The Children's Home of Cincinnati, to which they were committed by the juvenile court. The petition alleges that the children are illegally restrained and deprived of their liberty, without any legal authority, by Meigs V. Crouse, superintendent of the Children's Home; that they were not detained for any criminal or supposed criminal matter; and that neither they nor the petitioner

have consented to their restraint and detention, and petitioner has frequently demanded of the defendant that he surrender the children, but that he has refused to comply with such demand. Plaintiff alleges that he is able, anxious and willing to care for them.

Meigs V. Crouse, as superintendent of the Children's Home, filed an elaborate answer or return, in which he challenged the sufficiency of the petition and the jurisdiction of the court. He then denied all of the allegations of the petition (fourth defense), and by way of fifth defense set forth in detail the facts pertaining to the commitment and detention of the three children, which in brief, were that for some time prior to and on January 21, 1914, the petitioner herein, and one Mary Bleier, who was the mother and had the custody of the minors, were living together as husband and wife, in Hamilton County, Ohio; that the petitioner and said Mary Bleier refused to earn an honest living, or work, but lived off the charity of various charitable institutions in the city, with the natural result that the children were poorly and improperly clothed and fed, abused and beaten, until January 21, 1914, a petition was filed, as provided by law, in the juvenile court, representing that the said children (William, then a boy of nine years; Henry, then a boy of eight years; and Charles, then a boy of one year of age) were dependent persons, and asking the court to inquire into the alleged dependency of those children; that a summons was duly issued commanding the said Mary Bleier to appear before the judge of the juvenile court with those children, and that at that time the said Mary Bleier with the petitioner herein did appear and request that the proceedings be continued, but that making no further attempt to properly provide and care for the children they were again cited to appear before the court, which they did, on May 16, 1914, at which time, after full investigation and consideration, the court found the allegations in said complaint to be true and that the children were dependent, and ordered them to be committed to the care, custody, maintenance and control of the said, The Children's Home of Cincinnati, and to remain under the care and control of said home until

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they severally arrived at the age of twenty-one (21) years; that a certified copy of the commitment (Exhibit "A") was duly attached to the answer, which commitment was recognized and designated as a temporary commitment; that the children remained in the care of the Children's Home under that temporary commitment for more than a year thereafter; that shortly after the commitment, Mary B. Bleier, the mother, left Cincinnati and went to Chicago, and that is the last heard of her: and that the petitioner remained in Cincinnati for a short time and called to visit the children at the home, when the superintendent and other officers pleaded with him to secure employment or to permit them to secure employment for him, so that he could properly support the three children, or at least, contribute to their support in the home, all of which the petitioner refused and neglected to do, and shortly after the commitment left the jurisdiction of the court and went to Chicago where he has been ever since.

The answer further alleges that after the children had been in the home for over a year they were permanently committed to the home by the juvenile court on May 26, 1915, and permanent orders of commitment were issued by the court marked Exhibits "B," "C" and "D"; that under the authority vested in the Children's Home it procured homes for each of said children and they are now in the care and custody of good parents and are receiving proper care and education; that two of the children, Henry and Charles, have been duly and regularly adopted by foster parents, through proper proceedings, as provided by the statutes, with the consent of the Children's Home and the juvenile court, and that the other child, William Bleier, is likewise in a good and proper home and his foster parents are ready and desire to adopt him through proper proceedings; that the petitioner is not ready and able to properly care for the children and that he seeks only to find out their whereabouts, which would be a serious detriment to the children, in that it would unsettle them in their new homes and in their love and respect and loyalty for their foster parents, and that the experience of all institutions having the care and custody

of dependent or delinquent children shows that information such as is sought in this case, in practically all instances, is used by the parents for improper purposes, and, at best, seriously interferes with the happiness and contentment of the children, and is therefore against public policy; and that said commitments were never set aside, nor attacked by this petitioner or any other person, and are in full force and effect.

The petitioner thereupon filed what he entitled a motion to quash the return and to require the defendants to set forth where the children were. The court based the judgment of dismissal solely upon the petition and the commitments attached to the answer. The intention of both parties apparently was, however, that the motion be regarded substantially as a motion for judgment on an agreed state of facts. See *Clayton, In re*, 13 Dec., 546. No technical question is raised here, and the court will consider the case on the merits.

The case raises important questions as to the construction and effect of the juvenile court statutes. Section 1648, G. C., provides that upon the filing of a complaint a citation shall issue requiring such minor to appear, and the parents or guardian, or other person, if any, having custody or control of the child, or with whom it may be, to appear with the minor, at a time and place to be stated in the citation.

The plaintiff in error contends that no citation was served upon him, and, that, therefore, he was not a party to the proceedings, and has not had a day in court. The contention is that the judgment of the court, while perhaps conclusive as between the state and the child, does not determine nor conclude the parent. Defendant in error replies that there is no averment of such facts in the petition. We do not rest our decision upon any technical question of the manner in which such issue must be raised.

It is a well-settled principle of law that no one is bound by a personal judgment or order of a court, who is not made a party thereto, and has not had a day in court, except parties privy in interest. *Sharp, In re*, 15 Idaho, 120 (96 Pac., 563; 18 L. R. A. (N. S.), 886). The petitioner is entitled to a day

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in court to have a determination of his rights regarding the custody of his children. *House of Refuge v. Ryan*, 37 Ohio St., 197; *Farnham v. Pierce*, 141 Mass., 203 (6 N. E., 830; 55 Am. Rep., 452n), and *Milwaukee Industrial School v. Supervisors*, 40 Wis., 328 (22 Am. Rep., 702).

How then is he affected by the commitment of his children by the juvenile court?

Proceedings under the juvenile laws are modern and do not coincide with any proceeding known to the old law. See *State v. Hoffman*, 31 O. C. A., —. The fundamental principle of the juvenile acts is conservation of the child. In the exercise of the power of *parens patriae* the Legislature has established the juvenile court and delegated to it certain of its powers. There is no authority to support the contention that notice to the parent is a condition prerequisite to jurisdiction of the juvenile court over the child. An examination of the juvenile law as a whole leads us to the conclusion that the jurisdiction of the court attaches to the child without regard to the citation of the parent. This is so, not because the parent has forfeited any of his legal rights, but because in such case the police power of the state is paramount. See *House of Refuge v. Ryan*, 37 Ohio St., 197, 203. When proceedings are regularly had in the juvenile court and there is a finding that the child is dependent, under Section 1643, General Code, it becomes a ward of the court. In the interest of the child and in the interest of society the court can commit its custody to strangers, or to an institution for its moral training and education. (*Marion Co. Children's Home v. Fetter*, 90 Ohio St., 110, 127.) The commitment by the juvenile court of Bleier's children as dependents does not, however, preclude him from asserting any right to their custody and care, and he may have a day in court to determine his rights. It does not follow that he may maintain *habeas corpus*, nor that he can select his own court. If a parent is improperly deprived of the custody of his child by the action of the juvenile court, he has his remedy under the juvenile act, but by a proper proceeding in that court. The jurisdiction of that court, when it attaches, is a continuing

jurisdiction, and no other court has authority to interfere in an independent proceeding with the custody of the child thus entrusted by law to the court. *Crist, In re*, 89 Ohio St., 33. The authorities show that after a child has become a ward of the juvenile court, the court has authority to vacate its original order, or modify the same, or make such further and additional orders in relation thereto as may be just and proper.

The proper forum for a parent who is not satisfied with the order of the juvenile court is the juvenile court itself, and such court will hear his application. *State v. Bristline*, 96 Ohio St., 581. See also *Cleveland Protestant Orphan Asylum v. Soule*, 24 C. C. (N. S.), 151.

Procedure in *habeas corpus* was specifically authorized under the statutes of Ohio existing at the time of the case of *House of Refuge v. Ryan, supra*. There was no other judicial remedy provided in Massachusetts and Wisconsin, as shown by the cases above referred to. The remedy now provided by the Ohio law is by an application to the juvenile court to modify its findings.

If the adoption proceedings have now rendered it impossible for the court to restore the children to petitioner, the responsibility rests not with the juvenile court, but with the parent who has delayed for so many years in asking for their restoration. If the laws which provide for the welfare of children generally and society as a whole operate to cause possible hardship in an individual case, that circumstance alone will not undo the laws which society has established for its own protection and betterment.

The authority to commit the children to the Children's Home is granted by Section 1653, G. C.

The determination by the court of common pleas that it was without jurisdiction to determine the plaintiff's right to the custody of the children that had become wards of the juvenile court was correct.

HAMILTON and CUSHING, JJ., concur.

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**DEFAULT IN MONTHLY PAYMENTS UNDER A CONTRACT  
FOR PURCHASE OF REAL ESTATE.**

Court of Appeals for Hamilton County.

**THE CONTRACTORS & BUILDERS SUPPLY CO. v. CRESAP.**

Decided, March 12, 1917.

*Contract for Sale of Real Estate—Default by Purchaser in Monthly Payments—Provision for Forfeiture and Re-Entry.*

Where a contract for sale of real estate provides for monthly payments, and in case of default that the seller should have the right to re-enter the premises with forfeiture of all payments as liquidated damages, and the purchaser makes default in payments under the contract, the seller is entitled to possession of the premises and to have the contract delivered up and cancelled, but the court will not enter judgment for the amount in default and order a sale of the property.

*Charles Sawyer and S. A. Headley, for plaintiff in error.**Heilker & Heilker and Ed. F. Alexander, for defendant in error.***HAMILTON, J.**

Heard on error.

Plaintiff in error brought an action in the common pleas court in ejectment, to recover possession of certain real estate in the possession of defendant under contract of sale, and for relief by way of cancellation of the contract of record.

The defendant had caused the contract of sale to be recorded in the recorder's office of Hamilton county, Ohio. The prayer of the petition asked for possession of said real estate and for cancellation of said contract on the record, and other relief, alleging a breach of the contract by the defendant. The defendant answered, admitting the execution of the contract and that he claimed an interest in said real estate, and followed these admissions with a general denial; and by way of cross-petition claimed a waiver of the conditions of the contract by the plaintiff, claimed sundry payments were made, charged breach of contract by the plaintiff, and asked for recovery of the payments made. Plaintiff in reply made a general denial of the

answer except as to the alleged payments. At the close of the evidence both sides requested an instructed verdict.

Upon the issues joined a judgment for possession of the real estate was rendered in favor of plaintiff; but cancellation of the contract on the record was refused and relief under the cross-petition was denied the defendant by the trial court. Exceptions were taken by both parties, and error is prosecuted to this court.

The contract provided for monthly payments, and in case of default that the seller, the plaintiff below, should have the right to re-enter the premises, and that all payments made should be forfeited as liquidated damages for the breach of the contract. An examination of the record discloses that defendant admitted default in payments under the contract, but requested the trial court to enter judgment for the amount in default and to order a sale of the property, etc. This request was properly overruled, as this would be to treat the contract as a mortgage lien, and we do not think the contract will bear that construction.

Further, all the material allegations of the petition were admitted in open court by counsel for defendant. It having been shown by the undisputed evidence and admission of the defendant that he had made default in his payments, resulting in a breach of the contract, the plaintiff was entitled under the terms of the contract to the possession of the premises. The breach of the contract having been shown, the plaintiff was entitled to have the contract delivered up and canceled. This was the holding in the case of *Kirby v. Harrison*, 2 Ohio St., 327, and also in the case of *Hansbrough v. Peck*, 5 Wall. (72 U. S.), 497. The plaintiff being entitled to have the contract delivered up and canceled, it was entitled to complete relief by having the contract canceled of record.

The judgment of the common pleas court will therefore be affirmed, except as to the refusal of the court to enter cancellation of the contract on the record, and as to that finding it will be reversed and a decree entered ordering cancellation of the contract on the record.

Judgment accordingly.

JONES, P. J. and GORMAN, J., concur.

**SPECULATIVE OPTIONS IN WHEAT ARE WAGERING CONTRACTS.****HAWKE v. ROBERTS & HALL.\***

Decided, June 1, 1920.

*Bills of Exceptions—Correction of Will be Denied, When—Option Transactions Based on Rise and Fall of Market Price of Wheat are Wagers and Void—Where Both Parties Intended it to be a Wager.*

1. A motion to correct a bill of exceptions will be denied where the correction of the bill would not result in a different conclusion from the one already announced.
2. Option transactions by which the contracting parties speculate in the rise and fall of market prices, one of the parties agreeing to pay to the other the difference between the contract price and market price at the date fixed for the execution of the agreement, are a wagering transaction and void.
3. In order to invalidate, as a wagering contract, an agreement which on its face is legitimate, both contracting parties must have understood and intended it to be a wager.

*S. Geismar and James Fitzpatrick*, for plaintiff in error.

*Moulinier, Bettman & Hunt*, for defendant in error.

Application for rehearing.

BY THE COURT.

Heard on error.

Plaintiff in error, George S. Hawke, has made application for a rehearing therein, and has also made a motion to correct the bill of exceptions. In support of the motion affidavits are offered on the part of the plaintiff in error to the effect that the bill of exceptions does in fact contain all the evidence offered at the trial, although the certificate of the trial judge does not so show. A counter-affidavit is filed on behalf of the defendants in error to the effect that not all of the evidence is contained in the bill of exceptions.

\*Motion to require the Court of Appeals to certify its record in this case overruled by the Supreme Court, December 6, 1920.

The question, on which the original opinion rendered was based, was argued orally at the time of the hearing in this court. Counsel for plaintiff in error were present, but preferred to make no oral argument, and the motion and affidavit filed after the decision was rendered are the first intimation to the court that there was any error in the certificate to the bill of exceptions. The court has the power under Sec. 11572-a, G. C., to permit the correction of a bill of exceptions where the interest of justice requires it.

The court, therefore, has examined the record and briefs of counsel to determine whether, if the record were corrected, it would avail the plaintiff in error.

The only witness at the trial was the plaintiff. He is a lawyer and was introduced to the defendants who are brokers with offices in the Mercantile Library Building, Cincinnati. After being introduced to them, he only faintly recollects occasionally speaking to one or the other. His transactions were by giving orders to employes to execute. He was dealing in wheat options, which, in answer to a question by his counsel as to the meaning of an option account, he defines as follows: "It means that I have an option to receive or buy some wheat when the time for delivery comes around." The transactions were in the usual form of legitimate and ordinary dealings. If the whole transaction were nothing more than a wager, and the understanding and agreement was that no goods were to be delivered, but that the parties were to speculate in the rise and fall of prices and one party was to pay the other the difference between the contract price and the market price at the date fixed for executing the contract, the transaction would be void, even though it were under the guise of a legitimate agreement. *Irwin v. Williar*, 110 U. S., 499; *Lester v. Buel*, 49 Ohio St., 240 and *Kahn v. Walton*, 46 Ohio St., 195.

The plaintiff testified that it was his intention to speculate and gamble. In order to invalidate a contract as a wagering one, both parties must intend that instead of delivery of the article there shall be a mere payment of the difference between the contract and the market price. A transaction which on its

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face is legitimate cannot be held void as a wagering contract by showing that one party only so understood and meant it to be. The proof must go farther and show that this understanding was mutual, that both parties so understood the transaction. *Clews v. Jamieson*, 182 U. S., 461, 489; *Irwin v. Williar*, 110 U. S., 499, 507, 508, and *Otis & Hough v. Thompson*, 4 O. App., 61, 63; 31 O. C. A.—.

The plaintiff in error contends that defendants are chargeable from the circumstances with knowledge of his intent. Unlike the case of *Otis & Hough v. Thompson*, *supra*, and *Lester v. Buel*, *supra*, there is nothing here to show that plaintiff did not have adequate means to consummate the transaction which he had made, and no evidence tending to show that the defendants knew anything about his means or circumstances. The record does not disclose that they did otherwise than act in good faith as brokers for plaintiff in procuring wheat options in accordance with law.

The correction of the certificate of the bill of exceptions would not result in a different conclusion from that already announced.

The motion to correct the record will be denied and the application for a rehearing refused.

SHOHL, HAMILTON and CUSHING, JJ., concur.

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**VALIDITY OF WILL OF AN ILLITERATE MAN ALMOST  
ONE HUNDRED YEARS OLD.**

**BARLION v. CONNOR, EXR., ET AL.**

**Court of Appeals for Hamilton County.**

**Decided, April 7, 1917.**

**Wills—Capacity to Make not Necessarily Affected by Great Age—Illiteracy Not a Bar.**

One is not incapacitated to make and execute a will merely because of advanced years or illiteracy.

*Horstman & Horstman*, for plaintiff in error.

*Powell & Smiley* and *John C. Healy*, for defendants in error.

JONES, P. J.

Heard on Error.

This was an action to contest the will of Francis Connor. An issue was made up and tried by a jury as required by Section 12082, General Code, resulting in a verdict sustaining the will, on which judgment was entered.

Among other considerations it is urged that the unusual age of the testator, who died at the age of almost, if not quite, one hundred years, and the fact that he was unable to sign his name, but executed his will by his mark (X), are elements tending strongly to establish his incapacity. We are aware of no rule of law that fixes any age beyond which a man loses testamentary capacity or which prevents an illiterate from executing a will.

A careful consideration of the record fails to show that the jury were not justified in finding testamentary capacity in the testator and that he was under no restraint. We find no substantial error to the prejudice of plaintiff in error.

Judgment affirmed.

GORMAN and HAMILTON, JJ., concur.

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**HABEAS CORPUS CAN NOT BE SUBSTITUTED FOR A  
PROCEEDING IN ERROR.**

Court of Appeals for Hamilton County.

**EX PARTE PHARR.**

Decided, February 19, 1920.

*Habeas Corpus—Does not Lie for Release of One Convicted in a Court Without Jurisdiction—Defendant a Minor Who Should have been Taken Before the Juvenile Court.*

1. Proceedings in habeas corpus will not be allowed to take the place of proceedings in error. If a judgment in a criminal case is erroneous, but not absolutely void, it can not be collaterally attacked.
2. Habeas corpus will not lie to secure the discharge of a minor who was indicted for a felony and convicted in the court of common pleas but who did not challenge the jurisdiction of the court until motion for a new trial, or prosecute error on the ground that he was under eighteen years of age and should have been first taken before the juvenile court in accordance with the provisions of Section 1659.

*Louis H. Capelle*, prosecuting attorney, and *Charles S. Bell* and *Charles Elston*, assistant prosecuting attorneys, for the sheriff.

*A. C. Fricke*, for petitioner.

*SHOHL, P. J.* (orally). This action is in habeas corpus. It is charged that the sheriff of Hamilton county, Ohio, unlawfully restrains Frank Pharr of his liberty.

In habeas corpus.

The sheriff has filed an answer alleging his election and qualification as sheriff, and states that he holds the petitioner by virtue of a sentence of the court of common pleas of Hamilton county, wherein it was ordered that the petitioner be imprisoned in the Ohio State Reformatory at Mansfield, Ohio, for an indeterminate period.

This court heard evidence. It appears that the petitioner was indicted by the grand jury of Hamilton county, Ohio, for assault with intent to kill, committed in November, 1918. He was convicted after a jury trial. In the course of the trial he took the witness stand, and was asked his age, and he said that he was 17 years old. No other mention of his age was made until the motion for a new trial was filed, and the point was made there that the court was without power to try the defendant. No error proceedings have been taken from the judgment, but the limitation of time for such proceedings has not expired.

Petitioner was never taken before the juvenile court, and claims that under Section 1659, General Code, the court of common pleas was without jurisdiction to try him. That section is as follows:

"When a minor under the age of eighteen years is arrested, such child, instead of being taken before a justice of the peace or police judge, shall be taken directly before such juvenile judge; or, if the child is taken before a justice of the peace or a judge of the police court, it shall be the duty of such justice of the peace or such judge of the police court, to transfer the case to the judge exercising the jurisdiction herein provided. The officers having such child in charge shall take it before such judge, who shall proceed to hear and dispose of the case in the same manner as if the child had been brought before the judge in the first instance."

Prosecuting attorneys, representing the sheriff, offered evidence that when petitioner was arrested and brought to the jail he gave his age as 18; that he was released on bail, and afterwards brought back, and at that time gave his age as 19. Petitioner's age is disputed.

It is clear that proceedings in *habeas corpus* will not be allowed to take the place of error proceedings. If the judgment in the criminal case was erroneous, but not absolutely void, it is not to be collaterally attacked. *In re Harry Allen*, 91 Ohio St., 315.

Aside from the question of the right of this court to determine controversies of this character, there is an important question of judicial policy. The Supreme Court of the United

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States has decided a number of important cases raising the question as to how far the court will go in *habeas corpus* proceedings. The rule is laid down that, barring exceptional cases, the hearing is confined to the single question of jurisdiction, and even that will not be decided in every case. *Henry v. Henkel, United States Marshal*, 235 U. S., 219.

At page 228 of the *Henkel case*, the court say:

"To establish a general rule that the courts on *habeas corpus*, and in advance of trial, should determine every jurisdictional question would interfere with the administration of the criminal law and afford a means by which, with the existing right of appeal, delay could be secured when the Constitution contemplates that there shall be a speedy trial, both in the interest of the public, and as a right to the defendant.

"The question has been before this court in many cases—some on original application and others on writ of error; in proceedings which began after arrest and before commitment; after commitment and before conviction; after conviction and before review. The applications were based on the ground of the insufficiency of the charge, the insufficiency of the evidence, or the unconstitutionality of the statute, state or federal, on which the charge was based. In some of the cases the applicants have advanced the same arguments that are here pressed, including that of the hardship of being taken to a distant state for trial upon an indictment alleged to be void.

"But in all these instances, and notwithstanding the variety of forms in which the question has been presented, the court, with the exceptions named, has uniformly held that the hearing on *habeas corpus* is not in the nature of a writ of error nor is it intended as a substitute for the functions of the trial court. Manifestly, this is true as to disputed questions of fact, and it is equally so as to disputed matters of law, whether they relate to the sufficiency of the indictment or the validity of the statute on which the charge is based. These and all other controverted matters of law and fact are for the determination of the trial court. If the objections are sustained or if the defendant is acquitted he will be discharged. If they are overruled and he is convicted, he has his right of review."

The federal rule is enlarged upon in the following cases: *Frank v. Mangum*, 237 U. S., 309; *Urquhart v. Brown*, 205 U. S., 179; *Markuson v. Boucher*, 175 U. S., 184; *Tinsley v.*

*Anderson*, 171 U. S., 101, 105; *Baker v. Grice*, 169 U. S., 284, 291; *Whitten v. Tomlinson*, 160 U. S., 231, and *Ex parte Royall*, 117 U. S., 241, 251.

"*Habeas corpus* proceeding is a collateral attack of a civil nature to impeach the validity of a judgment or sentence of another court in a criminal proceeding, and it should, therefore, be limited to cases in which the judgment or sentence attacked is clearly void by reason of its having been rendered without jurisdiction, or by reason of the court's having exceeded its jurisdiction in the premises." *In re Frederick*, 149 U. S., 70, 76.

If after a defendant has been convicted in the court of common pleas, this court were to entertain petitions for *habeas corpus*, to determine whether or not the petitioner was of legal age, it might be used as a substitute for the functions of the trial court. Such controverted matters of fact can best be determined there.

There are no exceptional circumstances shown in the case at bar to take it out of the rule laid down by the Supreme Court.

This case, however, raises an important question in regard to the prosecution of offenders under the age of 18 years.

Counsel for petitioner cites and relies on the case of *State of Ohio v. Joiner et al.*, 20 N. P., (N. S.), 313, a decision of the common pleas court of Geauga county. In that case Ray Joiner, a child under 18 years of age, was indicted for murder. He was bound over to the grand jury by a justice of the peace. A plea in abatement was filed alleging him to be under 18 years of age, and this was admitted by demurrer. The court decided that by reason of the juvenile court law it was necessary that the case be first sent to the juvenile court, and that unless the juvenile judge sent the case to the grand jury he could not properly be indicted. The court in its opinion uses such phrases as "the sound discretion of the juvenile judge is prerequisite to the vesting of jurisdiction in the common pleas court." This, of course, was not necessary to the decision of the case, which would have been correctly decided if the matter was not jurisdictional, but involved merely the proper procedure for the procuring of an indictment.

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If the defendant in the original criminal case had followed the procedure of counsel for defendant in the *Joiner case*, the court might have dismissed him and ordered him sent to the juvenile court.

The juvenile court law is in accordance with the trend of the best modern sociological and juristic thought, and this court would be slow to destroy or weaken the powers of that court.

It is not necessary for us to decide in this case whether under the juvenile court law a proper indictment can be had against a juvenile unless a juvenile judge in his discretion has directed it. It may be improper for us to decide the point at all, but this court wishes to be clearly understood in saying that it does not now decide that action by a juvenile judge is unnecessary.

The court of common pleas under the constitution and statutes has jurisdiction to hear and determine criminal cases, and if a juvenile is to be tried for such an offense as that named in the indictment a trial in the court of common pleas is undoubtedly proper. *Leonard, Supt., v. Licker*, 3 Ohio App., 377. 23 C.C.(N.S.), 442.

Section 1681, General Code, is as follows:

"When any information or complaint shall be filed against a delinquent child under these provisions, charging him with a felony, the judge may order such child to enter into a recognizance, with good and sufficient surety, in such amount as he deems reasonable, for his appearance before the court of common pleas at the next term thereof. The same proceedings shall be had thereafter upon such complaint as now authorized by law for the indictment, trial, judgment and sentence of any other person charged with a felony."

Whether a proper procedure was had in procuring the indictment is a different question, and one that should not be decided collaterally in this proceeding. It could be decided on error in the same way in which the questions were raised in the case of *Rogers v. The State of Ohio*, 87 Ohio St., 308. The court there decided that before a prosecution in the probate court in certain cases could be instigated it must be founded

upon an information. If the defendants in those cases, instead of proceeding in error, had attacked the judgments collaterally in *habeas corpus*, no doubt the court, like the Supreme Court of the United States, would have refused to consider the *habeas corpus* unless exceptional circumstances were shown, and would have relegated the litigants to ordinary procedure.

The writ will be denied.

HAMILTON and CUSHING, JJ., concur.

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**ALLEGATIONS AS TO CRIME MUST BRING THE OFFENSE  
WITHIN THE STATUTE.**

Court of Appeals for Cuyahoga County.

**NOBLE v. STATE OF OHIO.**

Decided, February 11, 1918.

*Criminal Law—Allegations Which Must be Embodied in an Affidavit Charging an Offense—Failure of Physician to Use Some Prophylactic to Protect Eyes of New Born Infant from Inflammation.*

1. An affidavit charging a crime must contain allegations of sufficient facts to bring the charge within the language of the statute under which prosecution is sought.
2. Section 1243-5, General Code, 106 O. L., 322, makes it a crime for a physician to fail to use some prophylactic against inflammation of the eyes of an infant immediately after birth in a "maternity home," hospital, etc., and an affidavit which charges such failure on the part of a physician in the home of a mother does not charge a crime under that section.

*McKay & Poulson*, for plaintiff in error.

*Jas. L. Lind*, for defendant in error.

LIEGHLEY, J.

Heard on error.

The parties stood in reverse order in the court below and for convenience will be mentioned herein as their relation there was.

The defendant, Dr. H. H. Noble, was arrested upon an affidavit, which reads in part as follows:

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"That on or about the 19th day of April, A. D. 1917, at the said City and County, one Dr. H. H. Noble then and there being a physician in attendance upon one Mabel Robertson in a case of childbirth in the home of said Mabel Robertson, did unlawfully fail to use some prophylactic against inflammation of the eyes on one 'Baby' Robertson, then and there being a newborn child, and did fail to make a record of the use of any such prophylactic."

Trial was had in the court below, which resulted in a conviction and sentence, from which judgment error is prosecuted to this court to reverse the same.

Said affidavit is predicated upon Section 1248-5 G. C. (106 O. L. 322), which, so far as pertinent here, reads as follows:

"It shall be the duty of the physicians, midwives, or other persons in attendance upon a case of childbirth in a maternity home, hospital, public or charitable institution, in every infant immediately after birth, to use some prophylactic against inflammation of the eyes of the new-born and to make record of the prophylactic used."

An examination of the statute discloses that the crime consists in a failure to use some prophylactic against inflammation of the eyes in the event of childbirth in a "maternity home, hospital, public or charitable institution." The affidavit charges a failure in such use in the case of childbirth in the home of Mabel Robertson, and is wholly silent as to whether or not this home was a maternity home, or what it was. The statute does not make a failure to use such prophylactic in any other place than those designated in the statute a crime. To sufficiently charge a crime it is absolutely essential that the affidavit in form contains allegations of sufficient facts to bring the charge clearly within the language of the statute.

We are of the opinion that the affidavit falls far short of containing the necessary requirements to charge a crime under this statute, and for insufficiency of the affidavit the judgment of conviction below is contrary to law.

Wherefore the judgment of conviction is reversed and the plaintiff in error discharged.

GRANT and DUNLAP, JJ., concur.

**DEVISE TO WIFE AND HER CHILDREN.**

Court of Appeals for Clinton County.

**CLARK ET AL V. CLARK ET AL.**

Decided, July 26, 1920.

*Wills—Devise to Wife and “to Her Children” Construed—Devise of  
Realty in Fee—Not Cut Down by Codicil, When.*

1. Under a will devising realty to a wife “and to her children,” each takes an equal undivided portion as tenant in common. The addition of the word “to” after the word “and” is superfluous.
2. A will which devises realty in fee by clear and unequivocal language can not be cut down by a codicil thereto in language not equally clear and certain.

Heard on error.

William H. Gilbert and W. A. Haines, for plaintiffs in error.

E. J. West and Smith, Rogers &amp; Smith, for defendants in error.

**CUSHING, J.**

- The action in the court below was for the partition of two tracts of land, 50 acres and 17.23 acres. The petition states that Eugene, Elsie and Thaddius H. Vandervert were the children and heirs at law of Edith Clark, deceased, that she was the daughter of Samantha J. Clark, and that Samantha J. Clark was the daughter of Josiah McKibben; that they are each entitled to an undivided one-tenth of the land described above; that Arthur Clark and Nina Deady, and the defendants in error, Atwood Clark and Alta Jones, each own an undivided one-fifth of said real estate.

Arthur Clark in his answer denied that Edith Clark was a devisee under the will of Josiah McKibben, deceased, and denied that the plaintiffs had any title or interest in said real estate. In a cross petition he states that Josiah McKibben died testate in 1889, seized in fee of the real estate described in the petition;

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and that he devised the 50-acre tract to Samantha J. Clark, a daughter, in fee.

Samantha Clark died April 1, 1919, testate. It is claimed she was seized in fee of both the 50-acre tract and the 17.23-acre tract. She devised all of said real estate to Arthur Clark and Nina Deady, share and share alike.

Arthur Clark in his cross petition claimed to own and be seized in fee of an undivided half of both of said tracts of land and averred that Nina Deady was the owner of the other half. In her cross petition Nina Deady adopts the allegations of the cross petition of Arthur Clark and claims the same relief sought by him.

The reply to these pleadings claims that Samantha J. Clark had a life estate only in the premises and that she had no power or authority to dispose of the property by will or otherwise; that the title to this property vested according to the will and codicil of Josiah McKibben. That will in so far as it relates to Samantha J. Clark is as follows:

"I hereby give, devise and bequeath to my daughter, Samantha J. Clark, her heirs and assigns forever, Fifty acres of land I bought of Nathan Hunter, her said land to extend from the northwest to the southeast, the entire width of said Hunter land, and extend northwest for quantity. And I also give her, her heirs and assigns, for the use and benefit of the said 50 acres, a reasonable right of way through the remainder of the said Hunter lands to the College Township Road, to be provided by the owners of the remainder of said Hunter lands, in such place as will be of most advantage to said 50 acres and the least damage to the said remainder."

This provision of the will gives Samantha J. Clark a fee in the 50 acres. The will was executed February 12, 1878. Pursuant to its provisions the children of Josiah McKibben on October 14, 1889, quitclaimed to each other any interest they had in the separate tracts of land devised. Prior to that time, on June 4, 1885, Josiah McKibben executed a codicil to his will. The part to be considered in this litigation reads as follows:

"I give, devise and bequeath to my beloved children John L. McKibben, Francis M. McKibben, William F. McKibben, Samantha J. Clark, and Rosilla Johnson all the rest residue and remainder of my estate real and personal not disposed of in the foregoing will to be equally divided between them in manner as follows, viz—They my said beloved children shall select two or three judicious neighbors who shall divide my said lands into five equal parts—equal in number of acres and assign to each one their particular part—and my will is that my personal property after my just debts and funeral expenses are paid shall be divided and disposed of in a similar manner as my real estate except that my beloved daughter Amanda Cast shall have an equal share of said personal property. In the division of my said lands my will is that my said son William T. McKibben shall have as part of his share a three cornered piece of land containing about one acre adjoining the lands he now owns and the lands of Betsy Brown and lying north of the State road. Further my will is that the lands devised and bequeathed to my beloved daughters Samantha J. Clark and Rosilla Johnson shall be to them and to their children and lastly I do nominate and appoint my beloved son William T. McKibben as executor of this my last will and testament."

It will be noted that the original will disposed of specific property, but did not contain a residuary clause. The first codicil refers to the will and adds "all the rest residue and remainder of my estate real and personal not disposed of in the foregoing will to be equally divided between them in manner as follows." This is a disposition of the residue of the testator's estate, whether accumulated after the making of the will, or undisposed of by him in the will. Thus far the intention of the testator is clear.

Looking to other provisions of the codicil as throwing light on the intention of the testator it will be observed that in giving William T. McKibben a three-cornered piece of land the word "land" is used. In the same paragraph he disposes of what he terms "lands." Was that a part of the rest, residue and remainder of his estate, mentioned in the codicil, or did he intend to include with the 17.23 acres given by the codicil the 50 acres given to Samantha J. Clark by the will? The language of the codicil is: "Further my will is that the lands devised and bequeathed to my beloved daughters Samantha J.

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Clark and Rosilla Johnson shall be to them and to their children."

From the use of the plural, "lands," and the language, "to them and to their children," it is argued that in so far as the devise to Samantha J. Clark is concerned the testator intended to include both tracts.

Considering the will and codicil together it seems clear that the use of the word "lands" by the testator referred to the land devised to Samantha J. Clark and Rosilla Johnson rather than to the two tracts given to Samantha J. Clark.

On this state of the record several questions of law are presented.

The law is that a devise by clear and unequivocal terms can not be cut down by language not equally clear and certain. *Parker v. Parker*, 13 Ohio St., 95; 1 Jarman, Wills (6 Am. ed.), 480 (\*443); *Thornhill v. Hall*, 2 Clark & Finn., 22; *Clark v. Hardwick Seminary (Tr.)*, 3 C. C., 152 (9 Circ. Dec., 87), and *Collins v. Collins*, 40 Ohio St., 353.

It is our duty to determine from the will the intention of the testator.

Our view of the contention of counsel that the word "lands" refers to the 50 acres and the 17.23 acres given to Samantha J. Clark is that the limitation in the codicil was the real and personal property not disposed of by the will, and that such limitation precludes the idea that the testator in executing the codicil had it in mind to in any way change the original bequest. The word "lands," therefore, used in the codicil, referred to the tracts therein devised to Samantha J. Clark and Rosilla Johnson, and it was not his intention to change the original bequest.

It is further argued that the use of the preposition "to," after the conjunction "and" in the phrase "to Samantha J. Clark and to her children," gave a different meaning to the will. The argument is carried to the extent that counsel insist that where the preposition is used it means to Samantha J. Clark and then to her children, giving her a life estate. Had the testator intended such a limitation on the bequest, simple language would have expressed that intent. There is no au-

thority authorizing a court to read into a will a word or phrase. Considering the language used, there can be no difference between the words "to her and to her children" and the words "to her and her children." The preposition is understood after the conjunction and the addition of it in this will is superfluous.

The law is that under a gift to a wife and children they take as tenants in common. There are a number of decided cases holding that the language under consideration gives the wife a life estate and the children the fee. In all of those cases the question was not determined from the language alone. It was only so decided when the language was considered in connection with other provisions of the will.

The word "children," when used in the connection it is in this codicil, has a technical meaning and imports a title by purchase. (*Newill v. Newill*, 7 Chancery App., 253.) There are no provisions or references in the will indicating that the testator intended other than that the ordinary legal meaning of children should have its full force and effect, nor are there any provisions in the will from which a conclusion could be drawn that Samantha J. Clark was to have a life estate only in all the property, with remainder to her children.

The conclusion is that the will gave to Samantha J. Clark the fee in the 50-acre tract by clear and concise language, and that if the testator intended to cut down the estate granted, the language used is not clear and unequivocal, and, therefore, the claim that Samantha J. Clark took but a life interest in the 50-acre tract can not be maintained; that the intention of the testator is ascertainable from the will and codicil; that the use of the language, "to Samantha J. Clark and to her children," gave to each an undivided one-sixth portion of the tract disposed of by the codicil; and that Samantha J. Clark had the fee to the 50-acre tract and a fee in an equal undivided share of the 17.23-acre tract.

The judgment of the court below will be reversed and the cause remanded with instructions to enter a decree according to this opinion.

SHOHL and HAMILTON, JJ., concur.

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**SERVICE OF SUMMONS ON FOREIGN CORPORATIONS.**

Judge Richards of the Sixth Judicial District sitting in place of  
Judge Shohl by Designation.

Court of Appeals for Hamilton County.

HURD v. JOHN B. RANSOM & Co.

Decided, June 28, 1920.

*Summons—Service of On a Foreign Corporation having no Agent in the State—Must be Made upon the Managing Agent—Not Good where Made on the President while Temporarily in the State—Error Lies to Sustaining of Motion to Quash Service, When.*

1. Service of summons upon a foreign corporation whose place of business is outside of the state, having no agents in Ohio and transacting its business in the different states by mail, is controlled exclusively by Section 11290, General Code.
2. Service upon such foreign corporation to be good must be made upon the managing agent, and when the sheriff's return shows service only upon the president, it not appearing what the duties of the president are, nor that he is managing agent, it is incumbent upon the plaintiff to prove that such president is the managing agent.
3. Where the president of such foreign corporation is in Ohio for the sole purpose of attending a national convention, his presence is merely temporary and incidental, and he is not doing business within the meaning of the law to afford a sufficient basis for service of summons.
4. Error proceedings may be prosecuted from a judgment sustaining a motion to quash service of summons, on the ground that a foreign corporation is not amenable to suit in Ohio. *Towne v. National Machinery Co.*, 29 O.C.A., 375, distinguished.

*Bettinger, Schmitt & Kreis*, for plaintiff in error.

*Frank F. Dinsmore*, for defendant in error.

**HAMILTON, J.**

Heard on error.

Error is predicated here upon the granting of the motion of the defendant below to quash and set aside the service of

summons upon the defendant. Defendant appeared for the purposes of the motion only.

The defendant below was a Tennessee corporation, whose place of business was in Nashville. It had no agents residing in Ohio. It transacted its business in the different states in the Union by mail. It was engaged in the lumber business. All orders taken were subject to the approval of the home office in Nashville, Tennessee.

The suit instituted below was upon an alleged breach of contract arising out of an order taken for lumber by the Chicago agent of the defendant company while casually passing through Cincinnati, the place of business of the plaintiff.

At the time of the attempted service of summons in the action, Arthur B. Ransom, the president of the defendant company, was in Cincinnati in attendance upon the National Hardwood Association meeting, which was the annual meeting of the Hardwood Association for a general review of the hardwood business. These facts appear in the deposition of Arthur B. Ransom, attached to the record. The return of the sheriff is as follows:

“Cincinnati, February 6, 1918.

“Served the within named defendant, John B. Ransom & Company, a corporation existing and doing business in Tennessee, by delivering a true copy of this writ, with all endorsements thereon, personally to Arthur B. Ransom, president thereof.

“George F. Schott, Sheriff of  
“Hamilton County, Ohio,  
“By Fred Sperber, Deputy.”

Was this service good?

The court below granted the motion to quash the service on the ground that the defendant company was not doing business in the State of Ohio in a way that would bring it within the jurisdiction of the court, but held that if the defendant was amenable to suit, the president was the proper person to serve, under Section 11288, G. C., and, in support of that position, cited the case of *Lively v. Picton*, 218 Fed., 401, 406. While we agree with the court below that under the facts as disclosed

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by the deposition of Arthur B. Ransom, the president, that the president's presence in Ohio was merely temporary and incidental, and did not constitute doing business, within the meaning of the law, to afford a sufficient basis for service of summons here, we do not rest our decision wholly on that ground. We think service of summons on a foreign corporation, such as the defendant here, is controlled exclusively by Section 11290, G. C., which provides:

"When the defendant is a foreign corporation, having a managing agent in this state, the service may be upon such agent."

Service of summons under Section 11288, G. C., is limited to service upon domestic corporations and such foreign corporations as are therein described. *Baltimore & O. Ry. v. Wheeling, P. & C. Transportation Co.*, 32 Ohio St., 116, 135. The defendant corporation is not one of the foreign corporations therein described. While in the case of *Lively v. Picton, supra*, relied upon by the trial judge to bring the case within the purview of Section 11288, G. C., is found an observation by the federal court that Section 11288 provided a permissive mode of service upon foreign corporations, that court did not rest its decision upon that point, as in that case the defendant company entered its appearance by demurrer to the plaintiff's petition, and, further, it appeared that the by-laws of the company expressly gave the president general management of the business of the company.

In the case of *Beach v. Kerr Turbine Co.*, 243 Fed., 706, the court held that service of process in Ohio on a foreign corporation is controlled by Section 11290, G. C., of Ohio, and cites with approval the case of *Goode v. Druggists' Association*, 16 Dec., 586, wherein the trial court held that the only mode of obtaining service of summons on a foreign corporation was provided in Section 11290. The case of *McCullough v. United Grocers' Corp.*, 247 Fed., 880, was to the same effect.

Under this view of the law service to be good upon a foreign corporation, such as the one in this case, must be made upon

the managing agent. The sheriff's return shows only service upon the president. To show proper service, in the return of the sheriff, it must appear that the service was made on the managing agent. It can not be said that the president is *ipso facto* the managing agent of a corporation. It does not appear what the duties of the president were. No by-laws or record of any kind are in the record to show what the duties of the president were as appeared in the case of *Lively v. Picton, supra*. While the return of the sheriff might have been corrected to show that the president was the managing agent, it not so appearing in the return, it was incumbent upon the plaintiff to prove the fact that he was such managing agent. That the return must so show is supported by the cases of *State v. King Bridge Co.*, 7 C. C. (N. S.), 557; *Nieswonger v. Aetna Ins. Co.*, Dayton Term Rep., 154, and *Fleckmyer Wheel Co. v. Commercial Wheel Co.*, 7 N. P., 613.

The point is made by the defendant in error that the judgment sustaining the motion to quash the service is not a final order from which error could be prosecuted. Since the point is sustained that the defendant was not amenable to suit in Ohio, under the facts in the case, the judgment was final, and the proceeding in error was proper. *State v. Pennsylvania Steel Co.*, 123 Md., 212 (91 Atl., 136); *Tatum v. Geist*, 40 Wash., 575 (82 Pac., 902), and *Cowden v. Stevenson, Wright*, 116.

The case at bar is distinguishable from *Towne v. National Machinery Co.*, 29 O. C. A., 375, for that case involved an Ohio corporation having its situs and principal place of business within the state.

The judgment will be affirmed.

CUSHING and RICHARDS, JJ., concur.

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**INVALID STATUTORY REQUIREMENT OF SAFE SCAFFOLDING,  
ETC., FOR THE USE OF EMPLOYEES.**

Court of Appeals for Cuyahoga County.

**ALUMINUM CASTINGS C. v. PATTEN.\***

Decided July 1, 1920.

*Master and Servant—Provision of Section 12593 Penalizing the Furnishing of Unsafe Scaffolding, etc.—Not a Lawful Requirement Within the Meaning of the Workmen's Compensation Act—Furnishing of Safe Scaffolding and Safe Place to Work Analogous.*

1. Section 12593, General Code, providing for liability of an employer for furnishing to employees improper ladders, scaffolding, etc., is not a "lawful requirement" within the meaning of Section 29 of the Workmen's Compensation Act (Section 1465-76, General Code), which imposes upon the employer liability for injuries due to his failure to comply with "lawful requirements" for the protection and safety of his employees.
2. An employer's duty to protect the lives and safety of his employees, in order to come within the meaning of the term "lawful requirement" as used in Section 1365-76, General Code, must arise by reason of either a statute, ordinance, or order of the industrial commission requiring him to adopt specific safety devices or safeguards or to do a specific act. A general duty not to be negligent is not within the meaning of the term.

*M. B. & H. H. Johnson and J. T. Scott, for plaintiff in error.  
Payer, Winch, Minshall & Karch, for defendant in error.*

*John G. Price, Atty. Gen., and R. R. Zurmehly, special counsel, amici curiae.*

SHOHL, P. J.

Heard on error.

Albert F. Patten was employed by the Aluminum Castings Co. in September, 1918. He was engaged in millwright work. In November the millwright crew started painting the inside walls and ceiling of the company's plant and was so engaged on January 11, 1919, when the scaffold on which he was working gave way and he fell and was injured. The scaffold was

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\*Motion to require the Court of Appeals to certify its record in this case overruled by the Supreme Court, November 16, 1920.

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constructed with planks and four ladders. A plank was laid upon the rounds of two ladders, constituting the stringer, upon which other planks were laid leading to a similar stringer at the other end. The construction was admitted to be proper and the mishap was due to some defect not discovered by visual inspection.

Patten brought an action against the Aluminum Castings Co. in the court of common pleas of Cuyahoga county, and recovered a judgment. The company prosecutes error to this court.

While the plaintiff in error contends that there was no evidence tending to show negligence on its part, an important issue of law was raised, the disposition of which renders unnecessary the consideration of the evidence in respect to negligence.

It stands admitted that the defendant had fully complied with the provisions of the workmen's compensation act. Under Section 1465-70, G. C., the company is not liable to respond in damages for injury to plaintiff except as provided in the act. The employer is not liable unless the plaintiff's injury arises from the wilful act of the defendant or its officers or agents, or from the failure of the employer, its officers or agents, to comply with a lawful requirement for the protection of the lives and safety of employees. Mere negligence will not support an action. See Section 1465-76, G. C.

There is no claim of wilful act on the part of the defendant, and Patten's claim to relief is based solely upon the contention that the defendant had failed to comply with a lawful requirement for the protection of the lives and safety of employees, in that it violated Section 12593, G. C.

Section 12593 is as follows:

"Whoever, employing or directing another to do or perform labor in erecting, repairing, altering or painting a house, building or other structure, knowingly or negligently furnishes, erects or causes to be furnished for erection for and in the performance of said labor unsuitable or improper scaffolding, hoists, stays, ladders or other mechanical contrivances which will not give proper protection to the life and limb of a person so em-

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ployed or engaged, shall be fined not more than five hundred dollars or imprisoned not more than three months, or both."

To what extent then can it be said that the provisions of the section last quoted constitute a lawful requirement within the meaning of Section 1465-76, G. C.?

In the case of *American Woodenware Mfg. Co. v. Schorling*, 96 Ohio St., 305, an employee was injured by reason of a car of lumber falling on him. He brought suit alleging that his injuries were caused by the negligence of the defendant in failing to comply with the lawful requirement for the protection of employees set forth in Sections 15 and 16 of the industrial commission act. (Sections 871-15 and 871-16, G. C.)

Those sections are as follows:

Section 871-15:

"Every employer shall furnish employment which shall be safe for the employees therein, and shall furnish a place of employment which shall be safe for the employees therein, and for frequenters thereof, and shall furnish and use safety devices and safeguards, and shall adopt and use methods and processes, follow and obey orders and prescribe hours of labor reasonably adequate to render such employment and places of employment safe, and shall do every other thing reasonably necessary to protect the life, health, safety and welfare of such employees and frequenters."

Section 871-16:

"No employer shall require, permit or suffer any employee to go or be in any employment or place of employment which is not safe, and no such employer shall fail to furnish, provide and use safety devices and safeguards, or fail to obey and follow orders or to adopt and use methods and processes reasonably adequate to render such employment and place of employment safe, and no employer shall fail or neglect to do every other thing reasonably necessary to protect the life, health, safety and welfare of such employees or frequenters; and no such employer or other person shall hereafter construct or occupy or maintain any place of employment that is not safe."

The Supreme Court held that the term "lawful requirement" as used in the Constitution and in Section 29 of the Workmen's Compensation Act does not include a general course of conduct, or those general duties and obligations of care and cau-

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tion which rest upon employers and employees, and all other members of the community, for the protection of life, health and safety. The failure to use care to furnish a safe place to work created no liability.

The court in discussing the constitutional provision says at page 313:

"If the failure to comply 'with a lawful requirement' includes an act which was actionable negligence simply because of the rules of common law, then the portion of the section which authorizes the taking away of any or all rights of action or defenses of employees and employers would be practically meaningless and inoperative. We should be holding that embodied in the same section was power to take away all rights of actions or defenses of employees and employers, and also a practical denial of power to take away any right of action."

The decision of the Supreme Court establishes that when there is merely a general duty of care imposed on the employer by law, that is to say a general duty not to be negligent, such duty is not a "requirement" for the protection of lives and safety of employees within the meaning of Section 1465-76. But when either by statute or by ordinance, or by order of the Industrial Commission, an employer is required to adopt specific safety devices or safeguards, or to do a specified act, and the employer fails to comply with such statute, ordinance or order, then the employer has failed to comply with a "lawful requirement," and is guilty of negligence *per se*, and is liable to the injured workman under Section 1465-76 for injuries caused thereby.

The duty with respect to furnishing a safe scaffold is analogous to the duty with regard to furnishing a safe place to work passed on in the Woodenware case. In neither case is a specific obligation to do a particular act laid on the employer. There is only a general duty to use care. Indeed, in the case at bar there is no affirmative requirement whatsoever, but only a criminal penalty for failure to perform a common-law duty in respect to scaffolds. The section in question imposes no penalty where there is no evidence of the employer's negligence. *Noble v. Crane & Co.*, 160 Fed., 55.

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"The avowed purpose of the compensation laws is to do away with the litigation between employers and employees for injuries arising in the course of the employment. As the Supreme Court said in the Woodenware case at page 322:

"The employer would, in such case, be put upon his defense exactly as if the old common-law rule and the antiquated and unsatisfactory methods of dealing with accidents in industrial pursuits still prevailed, and as if no law had been passed and no effort made by the state to respond to the sentiment of the people, created by long and harsh experiences, that a more humane and satisfactory system should be erected."

The rule applied by the court of common pleas would make possible and probable the return to the old order so far as the building trades were concerned, with all of its concomitant evils. It would tend to deprive the employer of the substantial protection afforded by the compensation act, and would likewise tend to promote litigation of the type which the best modern economic thought has relegated to the discard. If the work men's compensation act and the industrial system thereby created will not afford protection to the employer, the industrial commission will not have accomplished its purpose in taking the place of private insurance companies, which it has supplanted. In view of the often repeated admonition of the Supreme Court not to regard its unreported decisions as authoritative precedents, we do not deem ourselves bound by the case of *Cleveland v. McLanahan* (not reported), in which case on January 21, 1919, the Supreme Court overruled a motion for order to the court of appeals of this county to certify its record.

We are of opinion that the facts shown here do not make out a case of failure to comply with a lawful requirement within the meaning of the act, and that the plaintiff is barred by the compensation act from prosecuting this action.

In view of the foregoing it is not necessary to discuss the contentions of the parties as to whether there was negligence of the defendant, or contributory negligence and assumed risk on the part of the plaintiff.

The judgment will be reversed and judgment will be rendered in favor of the plaintiff in error.

HAMILTON and CUSHING, JJ., concur.

**REGULATION OF CONSTRUCTION AND REPAIR OF BUILDINGS.**

Court of Appeals for Hamilton County.

**MAXEDON v. RENDIGS, COMMISSIONER OF BUILDINGS.\***

Decided, May 28, 1917.

*Municipal Corporations—Arbitrary Nature of the Power Conferred by Section 3636 Relating to Buildings, Their Sanitation, Repair, Alteration, etc.—Owner Unavoidably Delayed in Making Building Safe and Secure—Owner Given Further Time to Comply with Orders of the Building Commissioner.*

1. The exercise of the power conferred upon municipalities by Section 3636, General Code, to regulate the sanitary condition of buildings and to provide for their inspection, repair and destruction, if necessary, is arbitrary in its nature; but it arises from necessity, and must always be distinctly for the public welfare, and with full recognition of the inviolateness of private property, as guaranteed in the Bill of Rights (Section 19, Article I of the Constitution); and the property must constitute a nuisance and the peril be imminent to warrant such summary action as its destruction.
2. Where the owner of a building, so situated as not to constitute a fire hazard to adjoining property, is delayed in making needed repairs in accordance with a building permit issued by a municipality, because of the failure of others to perform contracts with him for parts of such work and because of the difficulty in bringing in materials, and he makes such building safe for his tenants during such repairs, an injunction will lie to prevent the destruction of such building, and the owner given a reasonable time to make such repairs.
3. In such case the court will not decide whether as an economic proposition it is better for the owner to tear down the building and use the materials in replacing it, or to make repairs.

*Thomas V. Maxedon, for plaintiff.*

*Charles A. Groom, city solicitor, and Dennis J. Ryan, assistant solicitor, for defendant.*

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## BY THE COURT.

Heard on appeal.

Authority is conferred by Section 3636, General Code, upon municipal corporations to regulate the erection, repair and alteration of buildings, to regulate their sanitary condition and provide for their inspection, and for the repair and destruction, if necessary, of insecure, unsafe and dangerous buildings.

The city of Cincinnati acting under the authority thus granted has in its code of ordinances provided in Section 487 for the inspection and condemnation of unsafe buildings. The power thus conferred is a necessary exercise of the police power of the state, under the maxim *salus populi suprema lex*, which authorizes and commands destruction of private property to save human life, to protect public health, to preserve property and to safeguard the public safety. But the property must constitute a nuisance, and the peril be imminent, to warrant such summary action as its destruction. The exercise of such power in its nature must be arbitrary, but it arises from necessity and must always be distinctly for the public welfare and with full recognition of the inviolateness of private property as guaranteed in the Bill of Rights (Section 19, Article I of the Constitution).

In this case the plaintiff, Thomas V. Maxedon, seeks to enjoin the building commissioner from demolishing and taking down a frame dwelling known as No. 4352 Badgeley road, and from interfering with its alteration and repair under a building permit which has already been issued by the commissioner for that purpose, alleging that the order to destroy said building is an abuse of discretion on the part of the defendant, and an unnecessary invasion of plaintiff's property rights.

It is conceded that such permit was duly issued, but it is claimed that plaintiff has been so slow and dilatory in proceeding with the work that there is no reasonable expectation that he will complete the work and protect the lives and health of his tenants and others going into said building, and that the delay is constantly augmenting the risk and adding to the danger.

The evidence shows without dispute that the stairway and the annex, or that part of the building in which the stairway is located, are in such an unsafe condition that they should be at once rebuilt or repaired so as to be entirely safe. This is part of the work contemplated by the owner and covered by the permit already issued. It appears that the foundation and sills of the main part of the structure are solid and sufficient for safety, but repairs are needed for the windows, weather-boarding, roof and other parts of the building, which we understand are covered by said building permit, as well as new doors and windows for the basement, and drainage and toilet facilities.

The court will not undertake to decide, as an economic proposition, whether it would be more desirable, as the building commissioner suggests, for the owner to take the present structure down to the foundation and use the material for the erection of a one-story structure upon the foundation, or for the owner to repair and rebuild the present two-story structure according to his present plans. That is a matter in which the owner of the property is entitled to act upon his own choice and judgment, so long as he pays due regards to the rights of the public to secure proper safety and sanitary conditions. Even though it might be entirely unwise from a financial view for the owner to undertake to preserve so much of his building as is admitted to be safe, he is acting within his rights in so doing, so long as he does not imperil the lives or property of others by maintaining the structure so rebuilt.

The house in question is set back from the street and is located so far from the nearest building that no claim is made of any danger to other buildings as a fire hazard. The only warrant for public interference with the plans and operations of the owner is to secure public safety and health of those occupying the property. Desirable as it might be from an aesthetic point of view to have public control of private building, the law does not permit an invasion of private rights on such grounds.

The delay of plaintiff in completing his rebuilding operations under his permit seems almost sufficient to exhaust the patience of the building department, and to provoke drastic

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measures to bring matters to a culmination. But it must be remembered that the delay has operated to the loss of the owner, who attempts to justify himself by undertaking to show the failure of others to perform contracts made with him for sundry parts of the work. He also shows difficulty in bringing in materials because of a destroyed bridge, and the condition of the unimproved street on which his property fronts.

Under all the circumstances of the case the court finds that the plaintiff should be given an opportunity to repair and rebuild his house in accordance with his permit, during the present building season, on condition that he proceed without delay to reconstruct and repair the stairway to the satisfaction of the building commissioner, making same safe for his tenants while the work progresses; or, that he have said building vacated until such stairway is so improved; and that all said work under such permit be completed by November 1, 1917; and that further proceedings under the notice of the building commissioner be restrained until further order of the court; and a decree may be taken accordingly.

Decree accordingly.

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#### BREACH OF TITLE FOR GOODS SOLD.

Court of Appeals for Cuyahoga County.

KWIATKOWSKI V. HOISLBAUER ET AL.

Decided, June 21, 1920.

*Sales—Breach of Warranty of Title—Demand of Superior Title-holder not a Condition Precedent to Action by the Buyer for Rescission for Breach of Warranty.*

Immediately upon breach of warranty of title in the sale of goods the buyer may, under Section 8449 General Code, rescind the sale, offer to return the goods to the seller, and recover the price paid, without showing any eviction or demand for possession of the goods made by the person having superior title thereto.

*David & Heald and Phil. Sampliner, for plaintiff in error.*

*Snyder, Henry, Thomsen, Ford & Seagrave, for defendants in error.*

SHOHL, P. J.

Heard on error.

The plaintiff in error, Clarence J. Kwiatkowski, purchased a moving picture show, and, after operating for a short period, sold it to defendants in error, Joseph Hoislbauer and R. William Kretschmer. At the same time, for a stated consideration of ten dollars, he assigned to the defendants in error the five-year lease of the theater building, wherein the chattels were located. The bill of sale purported to transfer the seats which were in the theater. It was in the exact language of the bill of sale whereby he had purchased the property in question previously, and so far as the evidence shows, Kwiatkowski believed in good faith that he was the owner of the seats as well as the other property. The buyers gave him cash and notes for the material to the controversy here. After an adjustment of the purchase price, not material to the controversy here, the seller was later paid in full. He received in all a lot valued at \$300 and \$2,187.73 in cash. After the buyers were in possession a short time the owner of the building told them that the seats in the theatre belonged to him. Thereupon the buyers attempted to rescind, tendered back a deed for all the property transferred to them, and brought an action to recover the purchase price paid. At the conclusion of all the evidence both parties moved the court for a directed verdict. They then thereby clothed the court with the functions of a jury, and had the court passed upon the motions and rendered judgment the decision so rendered would not be set aside by a reviewing court unless clearly against the weight of the evidence. *First Nat'l Bank v. Hayes*, 64 Ohio St. 100; *Strangward v. American Brass Bedstead Co.*, 82 Ohio St. 121, and *Perkins v. Putnam Co. Comrs.*, 88 Ohio St. 495.

The court submitted the case to the jury. Had he rendered a correct judgment without submitting the case to the jury, no complaint could be made. So far as the substantial rights of the parties are concerned, they were not prejudiced by the fact that the court learned the opinion of the jury before rendering his judgment, if his determination was correct. At the

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trial the buyers, who were the plaintiffs, offered the evidence of one Peter Witt. His testimony showed that at the time of the sale to the plaintiffs the seats belonged to the Forest City Investment Company, of which he was an officer. His credibility is not questioned nor was there any evidence given to contradict his testimony.

The plaintiffs went to trial apparently under the mistaken impression that they were required to establish fraud in order to make out a case. Under Sec. 8393, G. C., there is an implied warranty on the part of the seller that he has a right to sell the goods, and there is a further implied warranty that the buyer should have and enjoy quiet possession of the goods as against any lawful claims existing at the time of the sale. On principle, therefore, it appears that when defendant sold the goods, there was an immediate breach of the implied warranty of right to sell. If there was a breach of warranty by the seller, the sales act, Section 8449, G. C., authorizes the buyer at his election to rescind the sale, offer to return the goods to the seller and recover any part of the price which has been paid. The seats had an approximate value of \$900 and constituted a substantial part of the goods sold.

The principal contention made on behalf of plaintiff in error is that the evidence fails to show any eviction or demand for possession made by the superior title, and that such demand or eviction constitutes a condition precedent to the right to sue. Under the circumstances of this case the owner of the seats would not make its claim to them until the expiration of the five-year lease, as the buyers were assignees of the lease and the seats were part of the premises for which they were paying rent. If the buyers were obliged to await the expiration of the five-year period, their theoretical right to get their money back from the seller might lose its value.

Must there be a claim or eviction before the buyer can get redress? As to sales of goods the authorities at common law are in some conflict as to this question. The effect of the provision of the sales act, Section 8449, G. C., would seem to give the buyer of chattels the right to proceed immediately, though

his possession had not been disturbed. (See Williston, Sales, Sec. 221.) By pursuing this course, the buyer assumes the burden of establishing the infirmity of the seller's title. *Jordan v. Van Duzee*, 139 Minn., 103, 107 (165 N. W., 877).

Under what are practically the undisputed facts the record presents a case of breach of the implied warranty of title. The defendants in error have prosecuted the right to rescind in accordance with the statute, which was but declaratory of the Ohio law, *Byers v. Chapin*, 28 Ohio St., 300, and are entitled to a judgment. The irregularities in the procedure have not prevented the accomplishment of substantial justice.

The judgment will be affirmed.

HAMILTON and CUSHING, JJ., concur.

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**LEASE WITH PRIVILEGE OF PURCHASE NOT A BAR  
TO PARTITION.**

Court of Appeals for Hamilton County.

**CROWE ET AL V. CROWE ET AL.**

Decided, June 30, 1919.

*Partition—Renewable Outstanding Lease with Privilege of Purchase not an Obstacle to.*

The existence of a lease for five years, renewable for five years, and granting an option to the lessee to purchase the land, is no obstacle to partition.

*M. F. Roebling and J. T. Rhyno*, for plaintiffs in error.

*Robert P. Hargitt*, for defendants in error.

SHOHL, P. J.

Heard on error.

Defendants in error were plaintiffs below and brought an action to partition certain property which had been owned by their father, John T. Crowe. It appears from the amended petition that on December 2, 1912, John T. Crowe executed a lease to defendant Michael Crowe for five years, with the privilege of purchase for \$12,000 at any time within the life of said lease, and the lease contained a provision for renewal for five years more on the same terms and with the same privilege of

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purchase. James Crowe, one of the heirs of the decedent, demurred to the amended petition, contending that the outstanding lease with option to purchase prevented partition.

The court below overruled the demurrer, and the defendants not desiring to plead further a judgment was rendered, to which they now prosecute error.

To enable a party to maintain an action for partition he must have an estate in possession, on by virtue of which he is entitled to enjoy the rents or the possession as one of the co-tenants thereof. *Eberle v. Gaier*, 89 Ohio St., 118, and *Taller v. Wiseman*, 2 Ohio St., 207.

The existence of an ordinary lease for years, under which the tenant is in possession, paying rent to the owners of the fee, is no obstacle to partition among such owners. *Werner v. Glass*, 16 W. L. B., 354 (9 Dec. Re., 686); *Willard v. Willard*, 145 U. S., 116, and 21 Am. & Eng. Ency. Law (2 ed.), 1153. See also 21 Halsbury's Laws of England, 841.

The possession of a tenant is regarded as the possession of the landlord, as shown in the foregoing authorities. Plaintiffs in error maintain that by reason of the existence of the option to purchase the title is defeasible, and may be defeated by the lessee exercising the option. Their contention is based upon the opinion of the court of appeals for the fourth district in *Fleming v. Minx*, 25 C. C. (N. S.), 198; 4 Ohio App., 406.

The defeasibility of title does not disable plaintiffs from prosecuting partition. The existence of a power of sale outstanding in trustees which might likewise destroy the estate of the lessors does not bar partition. (*Boyd v. Allen*, 24 Ch. D. 622.) The owner of a base fee is entitled to partition. (*Askins v. Merritt*, 254 Ill., 92 [98 N. E., 256], and *Pitzer v. Morrison*, 272 Ill., 291 [111 N. E., 1017]). The full report of the case of *Fleming v. Minx*, *supra*, shows that the so-called tenant was in fact a mortgagor in possession, though nominally she had only a lease with the right to purchase.

The mere existence of the option is insufficient to take the case out of the rule established by the foregoing authorities.

The judgment will be affirmed.

HAMILTON and CUSHING, JJ., concur.

**DISTRIBUTION OF WIFE'S INHERITANCE NOT A BASIS  
FOR A CONTINUING TRUST.**

Court of Appeals for Hamilton County.

McCORD v. CENTRAL TRUST & SAFE DEPOSIT CO.\*

Decided, March 29, 1920.

*Trusts—Inheritance of Insane Wife Distributed by Husband—Not a Basis for Declaration of a Continuing and Subsisting Trust—Action to Collect Debts Due Decedent Can Not be Maintained by Next of Kin.*

1. A petition against the executor of plaintiff's father, alleging that plaintiff's mother had inherited an estate and being of unsound mind the money was given to the father, and that after the death of the mother the father distributed the inheritance among his children, refusing, however to give to plaintiff his full share of such inheritance, does not state facts which make out a case of continuing or subsisting trust. If any right of action ever accrued to the plaintiff it arose at the mother's death, which was more than six years prior to the commencement of this suit, and is barred by the statute of limitations.
2. The next of kin can not, in the absence of special circumstances, maintain an action in their own names to recover unadministered personal property of the decedent or collect debts or other choses in action due the decedent.

*T. V. Maxedon, for plaintiff in error.*

*Robertson, Buchwalter & Oppenheimer, for defendant in error.*

SHOHL, P. J.

On January, 30, 1919, Frank L. McCord brought suit in the court of common pleas against the Central Trust & Safe Deposit Company, as executor of the estate of James W. McCord, his father. The court sustained a demurrer to the petition and to

\*Motion for an order directing the Court of Appeals to certify its record in this case overruled by the Supreme Court, June 28, 1920.

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an amended petition. Plaintiff then filed a second amended petition, to which a demurrer was sustained, and, upon plaintiff's inability to plead further, judgment was rendered in favor of the defendant.

The second amended petition alleges that on or about November 27, 1907, the wife of James W. McCord inherited an estate of about \$1,500 from her sister; that at that time she was of unsound mind, and on March 10, 1908, the executrix of her sister knowing of her mental condition and that she was not capable of properly looking after and caring for her interest in the estate sent \$1,000 of the money to her husband, James W. McCord; that on June 27, 1908, plaintiff's mother died intestate; and that, thereafter, James W. McCord, without causing administration to be had upon the estate of his wife, acted as administrator and received as such from the estate of his deceased wife's sister the balance of the inheritance due his wife, namely \$513, and distributed said inheritance among his children, refusing, however, to give to the plaintiff his full share of such inheritance, and never did. Plaintiff exhibits an account which is made a part of the petition, showing the amount received by him, and claims a balance due, amounting, with interest from February 1, 1911, to the sum of \$533.20, for which he prays for an accounting and for judgment and for all proper relief. The court of common pleas held on demurrer that the petition shows on its face that the action was not brought within the time limited for the bringing of such actions.

Plaintiff in error urges that the facts make out a case of continuing and subsisting trust, and that, therefore, under Section 11236, G. C., the statute of limitations is not a bar. To come within the provisions of that section the case must fall within a class of technical or direct trusts, in which there is no remedy at law to which a limitation has been fixed.

The facts alleged do not show an agreement to hold as trustee, either express or implied, nor do they make out a trust which results from express or implied agreement. It is rather of the character of a constructive trust. 1 Perry, Trusts (6 ed.), Sec. 166. There is no averment of any agreement or prom-

ise whatsoever on the part of James W. McCord, nor would the allegations of conclusions of law take the place of averments of fact. *Pittsburgh, C. & St. L. Ry. v. Moore*, 33 Ohio St., 384. The situation is analogous to that presented by the case of *Douglas v. Corry*, 46 Ohio St., 349. In that case an attorney had collected money which belonged to a client, which he was under the duty of turning over to her, but which he did not do. It was held that this did not create a continuing and subsisting trust and that the statute of limitations ran from the time the money was received and should have been turned over. No equitable relief was required. The proper remedy would have been a plain action at law for money had and received. See also *McCauley v. German Natl. Bank*, 17 N. P. (N. S.), 305, and cases therein cited.

Plaintiff's mother by reason of her disability was unable to bring suit, but if any right ever accrued to plaintiff it arose at her death, which was more than six years prior to the 30th day of January, 1919. The court of common pleas was correct in deciding that the petition showed on its face that the claim was barred by the statute of limitations.

But there is a further consideration. The petition shows that the money belonged not to the plaintiff, but to his mother. In the absence of special circumstances, the next of kin can not maintain actions in their own name to recover unadministered personal estate of the decedent or collect debts or other choses of action due him. Such actions can be maintained only by the personal representative of the deceased. *McBride v. Vance*, 73 Ohio St., 258, and *Davis v. Corwine*, 25 Ohio St., 668. See note to *Buchanan v. Buchanan*, 22 L. R. A. (N. S.), 454.

It is unnecessary to advert to the fact that if the property of Mrs. McCord were to be administered it would be subject to the payment of her debts and to the rights of her widower under the statute.

The judgment will be affirmed.

HAMILTON and CUSHING, JJ., concur.

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**DISCRETIONARY POWER TO VACATE OR MODIFY JUDGMENT.**

Court of Appeals for Summit County.

**A. A. WYBEL v. J. M. SHEAFFER..**

Decided, April 30, 1919.

*Judgments—Inherent Power in a Court to Vacate or Modify Its Judgments During Term—Purpose of Affidavit with Reference to Military Service.*

1. The power of a court to vacate or modify its judgments during term is inherent and plenary, and is not controlled by Section 11631, General Code, which relates to vacating and modifying judgments after term.
2. A court is not limited to the grounds set forth in Section 11631, but on good cause shown may act upon any other ground which in the exercise of its sound discretion it deems sufficient, and the exercise of such discretion will not be controlled by a reviewing court in the absence of proof of a clear abuse of discretion.
3. The federal statute requiring an affidavit that the defendant is not in the military service before judgment may be entered, is for the protection of those in such service, and the failure to file such an affidavit is not sufficient ground to set aside a default judgment against a defendant who never was and never claimed to be in the military service, but who appeared in court, was represented by counsel, and failed to raise such issue until after judgment was entered.

*Jonathan Taylor*, for plaintiff in error.

*Rockwell & Grant*, for defendant in error.

**WASHBURN, J.**

In this action J. Milton Sheaffer, defendant in error, sued A. Wybel, plaintiff in error, on several promissory notes.

According to the record, summons was duly served on Weybel on July 27, 1918.

Default judgment was entered on September 3, 1918.

On September 5, 1918, an oral application was made to the court by the attorney for Wybel to vacate said judgment.

A hearing was had on said motion; on September 9th, it was overruled, to which ruling an exception was taken, and the matter is now before this court on a petition in error.

A court has control of its judgments and decrees up to the end of the term at which they are entered. It may, at its discretion for good cause shown, set aside and vacate its judgments or modify them. *Huntington & McIntyre v. Finch & Co.*, 3 Ohio St., 445; *Knox County Bank v. Doty*, 9 Ohio St., 505; *Niles v. Parks*, 49 Ohio St., 370; *Marguno and Tomfocaro Co. v. Clymonts*, 16 C. C. 237, 10 Circ. Dec., 427; *Seelbach v. Craft*, 21 C. C. (N. S.), 158.

The discretion vested in a court to vacate or modify its judgments during the term is a legal discretion and can not be exercised in an arbitrary manner, or at the mere desire of the court; a justifiable cause for such action must exist. *French Wax Figure Co. v. Jupp Baxter Co.*, 21 C. C., 761, 12 Circ. Dec., 76.

This power of the court is independent of Sec. 11631, General Code, which governs where it is sought to vacate or modify a judgment *after* term. (*Van Camp v. McCulley*, 89 Ohio St., 1 (104 N. E., 1004). While the power of the court over its judgments during the term is inherent and plenary, still a judgment can not be set aside except for good cause shown.

One or more of the grounds set forth in Section 11631 would constitute a good cause, but the court is not limited to such grounds; a court may act upon any other ground which in the exercise of a sound discretion it may deem sufficient.

It follows that the control of a reviewing court over this discretion of a lower court is limited to cases where an abuse of discretion is clearly shown.

The controlling question for us to determine, having in mind these well-settled principles of law, is: Does an examination of the record in this case disclose an abuse of discretion on the part of the trial court in overruling the motion to set aside the default judgment in question?

No written motion was filed and none of the grounds set forth in Section 11631, General Code, existed or were claimed.

The claimed "good cause" for setting aside the judgment

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grows out of the following facts: Before answer day, the attorney for Wybel, being busy in patriotic work, asked the attorney for Sheaffer "if he would object to time being granted for pleading, and he said he did object to it and wouldn't grant a minute." The attorney for Wybel then had a talk with one of the judges in the hall of the courthouse about further time, and reported to the attorney for Sheaffer that time to plead had been extended a week and the attorney for Sheaffer "didn't seem rejoiced over the matter, but said nothing, only he looked rather displeased; peeved, so to speak."

No entry extending time to plead was made by the court, but the attorney for Sheaffer observed the reported extension of a week's time, which, if it was an extension, was irregularly made, in his absence, without his knowledge, and when it was known that he would object if given an opportunity. After the expiration of the extension the default judgment was entered.

A situation was thus presented in which perhaps it would not have been an abuse of discretion if the court had granted the motion, but the matter as presented to the court was peculiarly a discretionary matter.

When the application was made to set aside the judgment, the judge to whom it was made recognized that the attorney for Sheaffer was in no wise at fault, and justified in insisting upon the rights of his client, but that the time between the answer day and the entry of default was short and there was some merit in the excuse of the attorney for Wybel, and accordingly, the judge considered the proposed answer of Wybel and heard testimony, as to the merits of the controversy and concluded, in view of the doubt there was as to there being any real merit in the proposed defense of Wybel, to exercise his discretion in refusing to grant the motion.

Under all the circumstances, we can not say that he abused his discretion.

It is suggested that the taking of a default without an affidavit being filed showing that the defendant was not in the military service was a good ground for granting the motion for setting aside the judgment.

As to this suggestion it is sufficient to observe that no such ground was presented to the court below, that the record shows that Wybel was in court and testified at the hearing on the motion, and that it is not claimed that he was in fact or ever had been in the military service. Moreover, the record discloses that Wybel had appeared and was represented by counsel in the case before the default was taken. The federal statute requiring such affidavit is for the protection of those in the military service.

DUNLAP and VICKERY, JJ., concur.

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#### WHO MAY BE JOINED AS DEFENDANTS BY CROSS-PETITION.

Court of Appeals for Hamilton County.

MOESER v. REPUBLIC DISTRIBUTING COMPANY.

Decided February 3, 1919.

*Parties—Persons Only Who Are Essential to a Determination of the Controversy May Be Brought in by Cross-Petition—Surety May Not Make His Principal a Party Defendant, When.*

1. Persons who are made defendant under Sections 11255 and 11262, General Code, must be those whose presence is essential to the determination of the controversy before the court, and a defendant can not by cross-petition bring in new parties in order to litigate matters wholly between themselves and which can not affect the right of the plaintiff to recover on his petition.
2. Section 12206, General Code, contemplates an original action by a surety against his principal to discharge the debt or liability, and a defendant who claims he was acting as agent and that his principal agreed to protect him from liability is not entitled to have his principal made a party defendant by cross-petition.

Heard on error.

*Charles B. Wilby and O. S. Bryant, for plaintiff in error.  
Pogue, Hoffheimer & Pogue, for defendant in error.*

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## SHOHL, J.

Henry A. Klein sued The J. W. Biles Company, alleging that he had purchased ninety-five barrels of whiskey, and paid for them, and the warehouse receipts which were delivered to him were fraudulent and invalid. Louis Moeser, as liquidating trustee of the Biles company, filed an answer, alleging among other things that the Biles company was merely acting as agent for the Republic Distributing Company, as plaintiff knew. He also filed a cross petition against the Republic Distributing Company, praying that if the receipts were invalid, as claimed by plaintiff, the Republic Distributing Company be held liable to plaintiff.

After a lapse of eighteen months the Republic Distributing Company demurred to the cross petition, and the demurrer was sustained.

Thereafter an amended cross petition was filed containing further allegations, but praying for substantially the same relief. To this a demurrer was again filed and was sustained.

The case of *Klein v. Moeser, Trustee*, was heard, and judgment rendered in favor of the plaintiff, the court finding that the warehouse receipts were illegal.

After the rendition of that judgment, the trustee again asked leave to file an amended and supplemental cross petition against the Republic Distributing Company. It was of a similar character to the earlier cross petitions, showing in substance that as between the Republic Distributing Company and Moeser, trustee, the relation of principal and agent existed, and also alleging an express agreement to protect the Biles company from liability. It also alleged that judgment had been rendered, and paid by Moeser, trustee, and asked judgment against the Republic Distributing Company for the amount paid and interest. The court refused permission to file the pleading, and dismissed the action as to the Republic Distributing Company. This action of the court is now complained of in these error proceedings.

Plaintiff in error relies upon Section 12206, General Code, which provides that a surety may maintain an action against his principal to compel him to discharge the debt or liability for which the surety is bound, after it becomes due.

Defendant in error contends that a defendant in a suit can not inject into the action a controversy between himself and an outsider, whose presence is not essential to the complete determination of the controversy between the parties who are already before the court. It may be that there is no decision by the Supreme Court of Ohio which conclusively adjudicates the question at issue.

An examination of the courts of last resort of other states shows the trend of judicial thought in respect to similar questions arising upon code provisions substantially similar to the Ohio law.

In Indiana a party defendant may not by cross complaint bring in new parties in order to litigate matters wholly between themselves, and which can not affect the right of the plaintiff to recover on his complaint. *Hunter v. First National Bank*, 172 Ind., 62, and cases cited.

Although the California code provides that "whenever the defendant seeks affirmative relief against any party to the action, relating to or depending upon the contract or transaction upon which the action is brought, or affecting the property to which the action relates, he may \* \* \* file \* \* \* a cross-complaint," a defendant is not authorized to bring in new parties by way of cross-complaint. *Clark v. Kelley*, 163 Cal., 207, and *Alpers v. Bliss*, 145 Cal., 565. See also *American Exchange Bank v. Davidson*, 69 Minn., 319; *Joyce v. Gowney*, 154 Mo., 253; *Bliss v. Winters*, 40 N. Y. App., 622; *N. Y. Life Ins. & Trust Co. v. Cuthbert*, 87 Hun, 339 (affirmed, 148 N. Y., 742), and *Hill v. Fink*, 11 Wash., 562.

The foregoing are in harmony with the decision of Judge Gorman in *The Kidder Press Co. v. The United Wrapping Machine Co.*, 8 N. P. (N. S.), 369. Learned counsel for plaintiff in error urge that Judge Gorman's opinion is based upon a misconception of the decision of the Supreme Court in *Wilkins v. The Ohio Natl. Bank*, 31 Ohio St., 565, which he regards as disapproving the decision by Judge Storer in the case of *Resor v. M'Kenzie, Sterrett & Co.*, 2 Disney, 210.

In the case of *Wilkins v. Bank*, the court says, at page 567:

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"It is contended, however, that where the holder of such an instrument elects to sue the surety alone, that such surety may, by cross-petition, bring in his principal, and then demand the protection prescribed in this section. The right of the surety in such case to thus bring in his principal, is sought to be worked out through the provisions of Section 500 of the code, which reads as follows: 'A surety may maintain an action against his principal to compel him to discharge the debt or liability for which the surety is bound, after the same becomes due.'

"Clearly, this section contemplates an original action."

It may be that the foregoing was really a dictum in the case, as it does not appear in the syllabus. It is in accordance with the practice in a majority of other states. In our opinion, it affords the better rule.

Sections 11255 and 11262, General Code, provide for bringing in new parties. The persons so brought in must be persons whose presence is essential to the determination of the controversy before the court.

Judgment affirmed.

JONES, P. J., and HAMILTON, J., concur.

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#### **COMPENSATION FOR TRANSPORTING PUPILS PAYABLE DURING A SPECIFIED PERIOD.**

Court of Appeals for Franklin County.

F. J. CASHDOLLAR V. WILL CLOTTES ET AL.

Decided, February 12, 1920.

*Schools—Transportation of Pupils—Compensation Payable During Month Schools Were Closed.*

1. A party hauling pupils to and from school under an entire contract for the school year is not subject to deduction for the time the schools are closed by a temporary order, indefinite as to time, of the board of health where it is conceded that such party during said period held himself in readiness to perform the contract.
2. The fact that compensation under said contract is payable by the month, and that the temporary order remained in force for one month does not affect the result.

*F. M. McCartney and David E. Evans*, for plaintiff in error.  
*Hugo N. Schlesinger*, Prosecuting Attorney, and *John H. Summers*, Assistant Prosecuting Attorney, for defendants in error.

ALLREAD, J.

Cashdollar contracted,

"To furnish horses and drive wagon of Route No. 4 to haul all pupils of said route to and from school for the school year 1918-1919 \* \* \* and also agreeing to abide by and maintain the rules and regulations adopted by said Board \* \* \*."

"And in consideration of said service the Board of Education agrees to pay to said E. J. Cashdollar the sum of Sixty-two dollars and fifty cents (\$62.50) monthly for nine months."

Cashdollar entered upon the performance of the contract. On November 30th the schools were ordered closed by the Board of Health and remained closed for the entire month of December. The question here involves the liability to Cashdollar for the month of December. The question arose upon demurrer to the answer which contained among other things an admission of the terms of the contract and of Cashdollar's readiness and willingness to comply with the contract during the month of December. The answer avers that the schools were closed by order of the Board of Health and remained closed during said month. It does not appear that the order closing the schools was for any definite period.

The contract under consideration was an entire contract for the school year of nine months at a stipulated compensation per month. According to the terms of the contract if Cashdollar performed he was entitled to the full compensation provided for. There was no exception relieving either party from the obligation so created.

The board of education relies upon an exception created by law. This exception is thus stated in 9 Cyc., 629:

"To the general rule that a party to a contract is not discharged by subsequent impossibility of performance there is an exception where the performance becomes impossible either by reason of (1) A change in the law or (2) By some action by or under the authority of the government. In such cases the promisor is discharged \* \* \* the exception does not apply, how-

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ever, where the impossibility created by the law is only temporary."

Most, if not all, the cases cited by counsel for defendant in error are cases where the future performance of the contract becomes wholly impossible and where both parties were therefore discharged. Here the future part of the contract was not wholly impossible. Cashdollar was not wholly relieved from future performance. On the contrary he was expected to perform the contract except for an indefinite period affected by the order of the Board of Health. It would seem to be reasonable that impossibility of performance by act of law should, to be effective, release both parties to the contract. Cashdollar under the circumstances of this case performed the first clause of the contract, to-wit: to furnish horses, and was ready and willing to perform the other covenants. The order being for an indefinite period Cashdollar was under obligation for every school day to be ready to comply with the contract and could not use his horses or employ his own time in any occupation inconsistent with his contract. We think it would, therefore, be unjust to hold Cashdollar and relieve the board for the indefinite and uncertain period covered by the Board of Health. The exception referred to in the text in Cyc., is applicable to the case at bar. The Attorney General in a very elaborate opinion sustained the Board of Education in a contract materially different from the one at bar. In the opinion he expressly confines the ruling to the contract under consideration. If the contract in the case at bar could be fairly construed to be one by the day or by the month the rule of liability might be different. Counsel for the Board of Education rely on the clause making the service subject to the order of the said Board, that, however, relates to the manner of service and not to the time which is definitely fixed by the contract. The Board would not, therefore, in our judgment be relieved from payment of said compensation by said order of the Board of Health suspending schools for an indefinite period.

Judgment of the court of common pleas reversed and that of the magistrate affirmed.

FERNEDING and KUNKLE, JJ., concur.

**INJURY CAUSED BY LIMOUSINE HIRED BY UNDERTAKER  
FOR USE AT A FUNERAL.**

Court of Appeals for Cuyahoga County.

Judges Shohl, Hamilton and Cushing of the First Judicial District  
sitting in the Eighth District by Designation.

GECHEI, BY ETC., v. BOLTZ.

Decided, June 21, 1920.

*Master and Servant—Liability for Accident Caused by a Servant—Hired to an Undertaker while Conducting a Funeral.*

A liveryman, whose business is supplying motor vehicles for weddings and funerals, furnished upon the order of an undertaker four limousines, together with drivers, to be used at a funeral which such undertaker was conducting. The liveryman owned the limousines, hired and paid the drivers, and he alone had power to discharge them. The undertaker directed the drivers where to go, whom to take in the different machines, gave them their positions in the funeral procession, and, after the funeral services, directed them to take the passengers home, without designating any direction or way to go. While taking his passengers home one of the drivers struck and injured a pedestrian. Neither the undertaker, nor anyone representing him, was with the machine which caused the injury, and there was nothing to show that he did anything to bring about the negligent act.

*Held:* The driver remained the general servant of the liveryman throughout the transaction and he is responsible for the negligence of such driver.

*Payer, Winch, Minshall & Karch, for plaintiff in error.  
Howell, Roberts & Duncan, for defendant in error.*

Heard on error.

HAMILTON, J.

The parties stand here in the order in which they stood below.

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The plaintiff, Mary Gechei, an infant, was knocked down and injured by a motor vehicle of the defendant, at a street intersection in the city of Cleveland, as she was going home from school. The motor vehicle was driven by one Herrick, a regular employee of defendant, George A. Boltz, and was at the time of the accident taking mourners home from a funeral which had just been held at Calvary Cemetery. The funeral was conducted by an undertaker named Jakab, who had ordered the motor vehicle of the defendant Boltz, a liveryman. The name of the deceased, whose funeral was being held, was John Murdi. The Murdi family in arranging for the funeral ordered twenty limousines for use at the funeral. The undertaker, taking a list of the liverymen engaged in this sort of work, ordered the limousines, four of which were ordered from the defendant Boltz, one of the four, driven by Herrick, being the machine which it is claimed struck the infant, plaintiff. Boltz had sent the limousines to the undertaker's office, and the undertaker had thereupon directed the said Herrick to get the priest and take him to the family residence, and, after the service at the house, had assigned him a place in the funeral line, with some of the mourners in his conveyance, to convey them to the cemetery, and, after the services at the cemetery had again directed him to take the mourners in his car to their homes. And it was while Herrick was taking the mourners home that that accident is alleged to have occurred.

At the close of plaintiff's testimony upon the motion of the defendant to dismiss the petition and render judgment for the defendant, the court granted the motion and withdrew the testimony from the jury, dismissed the petition, and rendered judgment for the defendant on his view of the law that the defendant liveryman was not liable as to the master. This is the error complained of in this case.

The case involves the question as to when a servant in the general employment of one person becomes with regard to a particular transaction a servant of another person. In other words applying the question to the instant case, was Herrick at the time of the alleged injury a servant of Boltz, the liveryman, or the special servant of the undertaker?

The facts as to the relationship of the parties are undisputed with the exception as to whether or not the undertaker was acting for himself in procuring the limousines, or as agent for the family of the deceased. But, this fact is not important in the determination of the question in this case. The general rule, supported by the great weight of authority, is that where a motor vehicle and driver are hired, and the hirer exercises no control or supervision over the driver as to the management of the machine, except to direct him as to the route and similar matters, the owner is responsible for the negligence of the driver. Huddy, Automobiles (5 ed.), Sec. 644; Blakemore (2 ed.), Babbit Law Applied to Motor Vehicles, Sec. 866; *Forbes v. Reinman & Wolfort*, 122 Ark., 417; *Johnson v. Coey*, 237 Ill., 88 (86 N. E., 678); *Tornroos v. R. H. White Co.*, 220 Mass., 336 (107 N. E., 1015); *Rodenburg v. Clinton Auto & Garage Co.*, 85 N. J. L., 729 (91 Atl., 1070), and *Wallace v. Keystone Automobile Co.*, 239 Pa., 110 (86 Atl., 699).

While the above is the fundamental principle, the question arises upon the application of the facts in this case to the principle announced.

In the case of *Kellogg v. Church Charity Foundation*, 203 N. Y., 191 (96 N. E., 406), the second paragraph of the syllabus is:

"Where an ambulance owned by the defendant and bearing the name of its hospital was kept at a livery stable, the proprietor of which furnished a horse to draw the ambulance and a man to drive it on such occasions as the defendant might indicate, the driver having been hired and paid by the livery stable keeper, who alone had the power to discharge him, the relation of master and servant is not established between the defendant and such ambulance driver as might be furnished from the livery stable. Such a contract does not make the driver the servant of the hirer or render his negligence imputable to the latter."

In the case under consideration the defendant liveryman not only hired and paid the driver of the limousine, but, in addition thereto, owned and furnished the limousine in ques-

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tion, and the evidence further shows that the power to discharge the driver was alone in the liveryman.

In the case of *Standard Oil Co. v. Anderson*, 212 U. S. 215 [29 S. Ct. 252], Mr. Justice Moody states in the opinion, at page 222:

"The simplest case, and that which was earliest decided, was where horses and a driver were furnished by a liveryman. In such cases the hirer, though he suggests the course of the journey and in a certain sense directs it, still does not become the master of the driver and responsible for his negligence, unless he specifically directs or brings about the negligent act."

In this case the undertaker testified that the widow of the deceased directed him to procure twenty limousines; that the liverymen who furnished motor vehicles for weddings and funerals had left their cards with him, that they might be called upon to serve in such business; that among the number he called were four limousines from Boltz; that the limousines were furnished together with drivers by the liverymen; that the limousines were sent to him and all he did was to give them their positions in the line of the funeral procession and direct the drivers as to where to go and whom to take in the different machines, and, after the services at the cemetery, direct them to take their loads home, without designating any direction or way to go. The undertaker testified that he was not with the machine which caused the injury, nor anyone representing him, and there is nothing to show that he did anything to bring about the negligent act. The undertaker did not pay the chauffeur nor the expenses of operation of the machine. While this latter fact alone is not sufficient upon which to determine the relationship, it is a circumstance for consideration in determining that fact.

A case much like the one here is that of *Frerker v. Nicholson*, 41 Col. 12 [92 Pac. 224]. In that case an undertaking company hired a carriage and driver from the defendant, a livery-stable keeper, to carry friends at a funeral to the cemetery and back to their homes. The plaintiff, one of the oc-

cupants of the carriage, was alighting in front of her home, on the return trip, when the driver suddenly started the horses, and the plaintiff was thrown to the ground and injured. The court held the driver was the servant of the defendant throughout the entire transaction and that the defendant was solely responsible for the negligence.

We are therefore of opinion that the facts make the relationship, *prima facie*, of master and servant between the driver, Herrick, and the defendant, Boltz.

The contract between the defendant and the undertaker fairly construed is an ordinary contract by the defendant to do his regular business by his servant in the common way. The undertaker who employed the services of the liveryman indicated the work to be done, and in that sense controlled the service as he would have controlled the liveryman if he had been present. He did his own business in his own way, and the orders which he received from the undertaker simply point out to him the work to be done. *Driscoll v. Towle*, 181 Mass. 416 [63 N. E. 12].

While under certain circumstances the general servant of one master may become the special servant of another, to such extent as to relieve the former from liability for the servant's negligence, under the facts of this case the general servant remained the servant of the liveryman throughout the transaction, and the servant was engaged upon the business of the liveryman.

The trial court rested its decision on the case of *Deppen v. Conkling Box Co.*, 19 N. P. (N. S.), 153. That case is not an authority here. If it was correctly decided, it is clearly distinguishable.

It follows that the judgment of the trial court was erroneous and the judgment will be reversed and the cause remanded for further proceedings.

SHOHL and CUSHING, JJ., concur.

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1921.]Montgomery County.

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**WITHDRAWAL OF A WITHDRAWAL OF CANDIDACY FOR  
PUBLIC OFFICE WITHOUT EFFECT.**

Court of Appeals for Montgomery County.

Judge Houck sitting by designation in place of Judge Ferneding,

D. C. BROWER ET AL, v. STATE OF OHIO EX REL VALENTINE RITZ.\*

Decided, July 13, 1920.

*Elections—Candidate may Withdraw but may not Withdraw his Withdrawal—Mandamus Will Not Issue, Unless—Office and Officer—Section 4976, General Code.*

1. A writ of mandamus will not issue against a public board or officer to compel certain specific action, in the absence of a clear and mandatory duty imposed by law.
2. A withdrawal of candidacy, if filed in proper time, is recognized by statute and is valid; but a withdrawal of such withdrawal of candidacy is not so recognized and may be disregarded by the deputy state supervisors of election.

*Matthews & Matthews, McCray & Dineen and Nevin & Kalbfus, for plaintiff in error.*

*McConnaughey & Shea and Turner & Turner, for defendant in error.*

By the Court. (Allread, Houck and Kunkle, JJ., concurring).

The original action was in mandamus to require the Board of deputy state supervisors to print relator's name upon the official primary ballot.

Counsel for the respective parties have fairly and ably presented the questions involved.

We have given the case the best consideration of which we are capable, and have reached a conclusion based upon what we believe to be a sound construction of the election laws.

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\*Motion for a writ of certiorari overruled by the Supreme Court, July 16, 1920.

We base our decision upon the undisputed facts. We are not required to go into the realm of disputed evidence.

Ritz, the relator, duly filed his declaration of candidacy.

June 26th, (forty-five days before the primary election day) Ritz filed with said board a withdrawal of his candidacy.

June 28th, two members of the board of deputy state supervisors of elections accepted relator's withdrawal of candidacy.

June 29th, the relator filed a withdrawal of his withdrawal of candidacy.

June 29th, the Secretary of State approved the action of the two members of said board.

Upon a careful examination of the questions presented we hold :

(1) The relator must show a clear right before he can obtain relief and the duty of the board must be one specially enjoined by law. *State ex rel v. Graves*, 90 O. S., 324; *State ex rel v. Liquor Board*, 93 O. S., 375; *State ex rel v. Stryker*, 95 O. S. 104.

(2) Section 4976 General Code, by reasonable construction recognizes the right of a candidate before the primary to withdraw, if such withdrawal is made and filed in proper time. *State ex rel v. Taylor*, 55 O. S., 385.

(3) The withdrawal of relator's candidacy, in our judgment, took effect as of the date of the filing thereof with the board of deputy state supervisors, and being filed within proper time, required no further action by the election authorities to make it effective.

(4) The statute does not expressly or by inference recognize a withdrawal of a withdrawal of candidacy. Consequently the law imposes no duty upon such board of deputy state supervisors with respect thereto. Under the well established law governing proceedings in mandamus, such board can not therefore be compelled to act where the statute imposes no duty.

(5) Under the pleadings and undisputed evidence the relator is not entitled to relief and the judgment below should be reversed and final judgment entered for plaintiffs in error.

Judgment accordingly.

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1921.]Jefferson County.

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**VALIDITY OF PROVISION FOR FREE TRANSPORTATION  
OF MAIL CARRIERS.**

Court of Appeals for Jefferson County.

**THE CITY OF STEUBENVILLE, OHIO, v. THE STEUBENVILLE, EAST  
LIVERPOOL & BEAVER VALLEY TRACTION COMPANY.**

Decided December Term, 1920.

*Municipal Corporations—Validity of Provision Embodied in Street Railway Grant—In Contravention of a Statute Subsequently Enacted.*

1. An ordinance of the city of Steubenville granting certain privileges in the streets of the city to an electric railway company, and in consideration thereof requiring the company to carry the city's mail carriers free within the city limits, is, when accepted by the company a contract, and entitled to the protection of the privileges of Article 1, Section 10, of the Constitution of the United States, and Section 28, Article 2, of the Constitution of Ohio.
2. Said ordinance having been passed prior to the enactment of Section 516, General Code, forbidding railroads from carrying certain persons free, the provisions of said section did not apply thereto, and it is the duty of the street car company to comply with all the provisions of the ordinance and carry the local mail carriers free within the city limits.

*Ralph Levinson & Wm. J. Ford, Asst. U. S. Attorney, for plaintiff in error.**W. McD. Miller, for defendant in error.***METCALFE, J.**

This case is in this court on appeal. The action is brought for a mandatory injunction to require the defendant to carry out the provisions of an ordinance granting a franchise to the defendant to use the streets of Steubenville to operate its cars, and including in that franchise a requirement on the part of the defendant to carry the local mail carriers of the city of Steubenville upon its cars, while on duty within the city limits, free of charge.

This contract was entered into several years ago by the predecessor of the present company, and has been carried out by the original grantor and its successors for a number of years since the granting of the franchise. But, some time ago the company came to the conclusion that in carrying out the provisions of this franchise that it was violating Section 516 of the General Code of Ohio, which prohibits railroads, and interurban and electric railroads from carrying certain persons free.

The provisions of the statute is that,

"No railroad company, owning or operating a railroad, wholly or partly within this state, shall, directly or indirectly issue or give a free ticket, free pass, or free transportation for passengers, except to its employees and their families,"

and others, specifically named. The only respect in which it is claimed that the mail carriers of the city were not included in this contract is in the exception "to railway mail service employees." Evidently that does not refer to mail carriers in the city. They are not working on a railway. They have no connection with railway mail service. They only ride upon the cars of the company the same as any other passengers in going about their business of delivering mail within the city limits. So we think there is no question but what the carrying of mail carriers is as much prohibited as any others not particularly mentioned in the statute.

The only question in this case is, as we view it, whether or not the franchise which was granted to the company and under which it is operating is a contract within the meaning of the laws and the Constitution of the United States, which prohibits any state from passing a law impairing the obligation of a contract, and of Section 28, of Art. 2, of the Constitution of Ohio, which embodies the same provision. This contract having been made prior to the passage of Section 516, does that statute impair the obligation of an existing contract? That is the question which we have to deal with here.

It is insisted in this case that the recent decision by the Supreme Court of the United States in the case of *Railroad Company v. Mottley*, 219 U. S., 467, governs this case.

In the Mottley case the defendant in error, Mottley and his

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wife were passengers upon a train of the Louisville & Nashville Railroad which came into collision with another train and they received some injuries. In the settlement of the matter it was agreed by the railroad company to grant Mr. Mottley and his wife free passage for their natural lives over the Louisville & Nashville Railroad and its connections. The company lived up to the contract faithfully for a number of years, until the passage of the United States Statute forbidding railroad companies from carrying certain persons upon their trains on passes and giving them free transportation.

The Supreme Court held that this contract could not be enforced, and that it was obnoxious to the provisions of the statute. The court say:

"The power of Congress to regulate commerce among the states and with foreign nations is complete and unrestricted except by limitations in the Constitution itself, and extends to rendering impossible the enforcement by suit of contracts between carriers and shippers although valid when made."

That is to say the contract between the Louisville & Nashville Railroad and Mr. Mottley was a valid contract when it was made but the legislation of the United States with regard to passes upon the railroads rendered the enforcement of that contract absolutely impossible.

This is under the provisions of the Constitution of the United States relating to interstate commerce. It will be observed that the Constitution of the United States does not prohibit Congress from passing a law impairing the obligations of a contract. Of course it does not follow that Congress can enact a law generally declaring void all contracts.

It does mean that the inhibition against passing laws impairing the obligations of contracts does not rest upon Congress but upon the states. So that where the necessities of the case require, as it is held that they do in the regulation of interstate commerce, that the legislation shall render a contract void or shall prohibit its performance or make its performance impossible, then Congress has the power to pass such legislation.

But it is a different proposition in legislation enacted by a

state. The language of the Constitution (Art. 1, Sec. 10) is "No state shall \* \* \* pass any \* \* \* law impairing the obligation of contracts." The doctrine that the charter of a corporation is a contract was first held in *Dartmouth College v. Woodward*, 4 Wheat., 578, and although resisted somewhat in this state, in some of the earlier cases as applying to certain bank charters, which provided for certain rules of taxation therein. (See *De Bolt v. Trust Co.*, 1 O. S., 563; *Bank v. De Bolt*, 1 O. S., 591; *Knoup v. Piqua Bank*, 1 O. S., 603; *Toledo Bank v. Toledo*, 1 O. S., 622.) It is now too thoroughly established in the law of this state and of the United States to be open to question. *Piqua Bank v. Knoup*, 16 How., 369; *Bank v. De Bolt*, 18 How., 380; *Sturges v. Crowningshield*, 4 Wheat., 122; *Fisher v. New Orleans*, 218 U. S., 438.

But, it is urged that the ordinance of a municipality does not come within the same rule in as much as the ordinance is not the charter of a corporation but only a grant of power to do certain things within the municipality. The ordinance in question grants to the company certain privileges and the company as part of the consideration for that grant agrees to carry the city's mail carriers free. It is not easy to see why such a transaction is not a contract, and we think the weight of authority clearly establishes the fact that it is.

In *City v. Gas Company*, 76 O. S., 309, where the city passed an ordinance granting certain rights to the gas company the court say:

"When the gas company accepts the terms of said ordinance according to law, and takes possession of and occupies the streets, etc., under said grant, such accepted ordinance becomes a valid contract between the parties."

And in *Grand Trunk & Western Ry. Co. v. R. R. Commission of Indiana*, 221 U. S., 400, it is said:

"A legislative act by an instrumentality of the state exercising delegated authority is of the same force as if made by the legislature and is a law of the state within the meaning of the contract clause of the Constitution."

And very recently the Supreme Court in *City of Cincinnati*

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v. *Public Utilities Commission*, 98 O. S., 320, where an ordinance had been granted by the city of Cincinnati to gas and electric companies granting privileges in the city the court said:

"A contract such as above described, which it passes in full compliance with authority expressly conferred, is protected by the provisions of Sec. 10, Art. 1, Federal Constitution that no state shall pass any law impairing the obligation of contracts."

We see no distinction between the decided cases and the instant case. The obligation imposed on the company by the provisions of the ordinance in question is a contract obligation which can not be impaired by the provisions of Sec. 516, G. C., and hence the relief prayed for must be granted.

POLLOCK and FARR, JJ., concur.

#### MONEY DEPOSITED FOR THE BENEFIT OF ANOTHER.

Court of Appeals for Mahoning County.

MARIA LUPLOW JONES v. CHRISTOPHER LUPLOW ET AL.

Decided, December Term, 1920.

*Trusts—Voluntary Express Trust Created by Deposit of Money for Benefit of Another, When—Pass Book Retained by the Depositor—No Power to Revoke the Trust, When.*

1. Where one declares an intention to deposit money in a savings account for the benefit of another and makes the deposit in his own name in trust for such other person and subsequently declares that fact; then, although the person making the deposit, retains the pass-book and withdraws from the account certain sums by check, such declarations, coupled with the deposit *in presenti* creates a voluntary express trust which is completed by the deposit and the designation of the one making the deposit as trustee.
2. It is not necessary to a completion of such trust that the settlor part with the possession of the trust property.
3. The withdrawal by the settlor of certain sums by check from the money on deposit does not annul such trust, there being no power of revocation reserved in the creation of the same.

*Mr. Charles J. Jackson*, for plaintiff in error.

*Mr. William L. Countryman*, for defendant in error.

FARR, J.

Heard on error.

Christopher Luplow and Maria Luplow, husband and wife, were, for some time prior to June 11, 1901, residents of the city of Youngstown, this county, and were possessed jointly of certain real estate which they sold for \$4,250.00, a part of which they reinvested in other properties. They were both wage earners and reared a family of children, the youngest of whom are Richard and Maria.

On the 11th day of June, 1901, Maria Luplow, the wife, deposited in a savings account with The Dollar Savings and Trust Co., of the city of Youngstown, \$700.00 in the name of "Maria Luplow, in trust for Richard and Maria," and the account so appears at the present time. Maria Luplow died June 20, 1919, and the husband, Christopher Luplow, was soon thereafter appointed administrator of her estate.

On the 25th day of September, 1919, Christopher Luplow as such administrator began an action in the court of common pleas of this county to reform said savings account, alleging that he is the owner and entitled to the one-half thereof, and asking that Maria Luplow, now intermarried with one Jones, be restrained from withdrawing any part of said money, and that the Trust Company be restrained from paying any portion thereof to her.

To his petition as administrator, Christopher Luplow filed an answer and cross-petition, admitting the allegations of the petition to be true, and asking a reformation of the account, and that he be found to be entitled to the one-half thereof, and that the remaining half be awarded the estate of Maria Luplow, deceased.

Richard Luplow, one of the beneficiaries, filed his answer, admitting the allegations of the petition to be true. Maria Luplow Jones filed an answer and cross-petition, and for a first ground of defense, admits the deposit and then tenders a general denial; for a second defense she avers the making of the deposit and that it was a gift and denies that any part belongs to Christopher Luplow; as a third defense she avers a trust was created in and to said deposit in favor of Richard Luplow and herself and asks one-half of the amount and that the restraining order be dis-

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solved; in her cross-petition she alleges that the \$700 was a gift, and asks that she be declared the owner of one-half thereof; to this answer Christopher Luplow and Richard Luplow filed replies and to the cross-petition answers, denying ownership in Maria Luplow Jones, and that said \$700 was either a gift or a trust, and the issues being joined, trial was had, which resulted in a decree reforming said account and awarding one-half to Christopher Luplow, as administrator aforesaid, and the remaining half to Christopher Luplow individually, and from which error is prosecuted here, and from which an appeal was also perfected; however, counsel elected to present the error case, which is probably unfortunate, as otherwise a proper decree might have been entered here.

The vital issue is, therefore, whether a gift of the \$700 was made or a trust created in it in favor of Richard and Maria Luplow. It is urged that neither could have resulted, because it is said that in no event more than the one-half of the \$700 originally deposited was the property of Maria Luplow, and that one-half at least belonged to Christopher Luplow. True, he says that the money belonged to him and his wife, but he says also that he advised her to deposit the money in the bank, as a matter of safety; he does not, however, fix the amount. The balance remaining from the proceeds of the sale of the Mead Street property, after the purchases on Salt Spring Road and Columbia Street, was \$1,850; however, Luplow knew of the deposit and undoubtedly knew of the manner in which it was made, because it was of common knowledge in the family, and was occasionally discussed by different members of it, and yet, knowing all this, he waited a little more than eighteen years, and until after the death of his wife, to assert his claim against it by this proceeding. He was, undoubtedly during these years, fully cognizant of the whole situation, and must have acquiesced; however, it is now too late for him to be heard to complain in that regard, because the time has passed when such contention will avail.

Did that which was said and done create a trust in favor of Richard and Maria, or was it a completed gift? As to whether or not a trust was created will first be considered, because a trust usually involves a gift.

The several elements which must concur in the creation of a trust are, a person competent to create it; sufficient words to establish it; a person capable of holding as trustee a specified or ascertainable object, a definite subject, and a declaration of the terms of the trust. To constitute an express trust there must be either explicit language to that effect or circumstances which show with reasonable certainty that a trust was intended to be created. No particular form of words, however, is required to create a trust, and whether one exists is to be ascertained from the intention of the parties as manifested by the words used and the circumstances of the particular case. If it appear to be the intention of the donor, from the whole instrument creating it, or by his expression and conduct at the time that the property conveyed is to be held or dealt with for the benefit of another, a court of equity will affix to it the character of a trust; and in determining whether or not a trust has been created, there must be taken into consideration the situation and relation of the parties; the character of the property, and the purposes which the settlor had in view in making the declaration. It is sufficient if the language used shows that the settlor intended to create a trust, and clearly points out the property, the beneficiary and the disposition to be made of the property. 26 R. C. L. 1179, 1180, 1181.

To summarize, it may be said that to create a trust, it is enough, if the property being personal, the settlor unequivocally declares, either orally or in writing, that he holds it *in presenti*, in trust or as a trustee for another. *Kay v. Simmons, Administrator*, 11 R. I., 266.

The record discloses here that Maria Luplow, on or about the 11th day of June, 1901, said to her daughter, Mrs. Engleheart, that she was going down town, or down to the bank, to deposit the money in question for the benefit of Richard and Maria, or words to that effect, and requested her daughter to accompany her, which she did; the deposit being made as indicated: "Maria Luplow in trust for Richard and Maria," which was a clear, unequivocal declaration concerning the definite sum of \$700, of her purpose, *in presenti*, and it is quite significant that, although some members of her family importuned her later to change the

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character of the deposit, she never did so, and it so remained for eighteen years, which fact alone, that is, lapse of time, discloses the idea of permanence and corroborates the theory of a trust. Moreover, Mrs. Luplow to others of her family, who so testify against interest, declared both before and after making the deposit, her purpose to create a fund for the benefit of her two youngest children, suggesting that she might not live to rear them, the suggestion itself clearly indicating her motive, and these declarations were competent. *Bank v. Albee*, 64 Vt. 571, 25 Atl. 487. Perry on Trusts, 1st Ed. Secs. 77, 177. 1 Greenl. on Ev. (12th Ed.) Sec. 189.

It is urged, and the record discloses, some testimony to the effect that the deposit was made in the form it was, for the purpose of avoiding the payment of taxes. If this were the motive, then it is somewhat singular that the remainder of the fund was not deposited. The whole balance from the sale of the Mead Street property, after reinvestment in the two other properties, was \$1,850, and it is not disclosed that at least a part or all of the balance of this amount was still in hand. However, this would not avail even if true, because an unlawful act could not be the basis of a defense against a lawful one, and the parties would be left just where they placed themselves, and it is held in the above case of *Bank v. Albee*, et al., that such defense is not available; the fifth paragraph of the syllabus of which reads as follows:

“That the father made the deposit in the name of the son to escape taxation is not such a fact.”

That is, such a fact as would negative the theory of a trust. Again, it is insisted that Mrs. Luplow retained the bank book and that this was inconsistent with the trust. Scarcely so; for indeed it was not improper for her to retain the book as trustee for such she had voluntarily constituted herself, and therefore, she might properly retain it, and so it is held in *Ray v. Simmons, Admr.*, 11 R. I. 266; the strong weight of authority is to the effect that the creation of a trust, if otherwise unequivocal, is not affected by the settlor's retention of the instrument of trust, especially where he is himself the trustee. *Exton v. Scott*, 6 Sim. 31; *Fletcher v. Fletcher*, 4 Hare, 67; *Carson's Adm'r v. Phelps*,

14 Am. Law Reg. N. S. 100; *Souverbye et ux v. Arden et al.*, 1 Johns Ch. 240; *Bunn v. Winthrop*, 1 John's Ch. 329.

It is further urged that inasmuch as Mrs. Luplow, during the eighteen years, withdrew by check certain sums of money, not large in amount or number, from this account, and that such withdrawals were inconsistent with the theory of a trust, and such must be conceded to be the case, but did she thereby annul the trust? Scarcely so, because a trust cannot be annulled by the person creating it in the absence of a power of revocation reserved by him for that purpose. *Bank v. Albee et al.*, 64 Vt. 571; 25 Atl. 487; *Sargent v Baldwin*, 13 Atl. 856; *Martin v. Fink*, 75 N. Y. 134; 15 N. Y. (App.) 807; *Curtis v. Price*, 12 Ves. 103; *Ellison v. Ellison*, 6 Ves. 656; *Salisbury v. Bigelow*, 20 Pick. 182, 183; *Stone v. Hackett*, 12 Gray, 227; *Souverbye v. Arden*, 1 Johns Ch. 258; *Viney v. Abbott et al.*, 109 Mass., 300; *Sewall, Excr. v. Roberts et al.*, 115 Mass. 262.

No matter what Mrs. Luplow said or did afterwards, inconsistent with an express, completed trust, if she had created one without the power of revocation, she could not thereby annul it, and the foregoing rests upon the equitable principle now well established, that a voluntary gift or conveyance of property in trust, when fully completed and executed, will be regarded as valid and its provisions enforced and given effect.

It is true that two cases, *Brahrook v. Savings Bank*, 104 Mass. 228, 6 Am Rep 222 and *Clark v. Clark*, 108 Mass., 522, seem to hold a different doctrine; however, in the first case the circumstances were deemed controlling and adverse to an intent to create a trust and in the last, which was similar as to facts, the court very briefly expresses the opinion that the trust was not complete, but without assigning any reason, and although entitled to much respect, is exceptional to the strong weight of authority in the United States. The English cases in this regard, quite a few of which have been examined, generally sustain the view of the large majority of the American cases.

Probably no case can be found more nearly upon the point than *Martin v. Funk, Administrator, et al.*, 75 N. Y., 134, in which it is held as follows:

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"Where \* \* a trust is declared, whether in a third person or the donor, it is not essential that the property should be possessed by the *cestui que trust*, or that the latter should be informed of the trust. S. deposited in a savings bank a sum of money belonging to her, declaring at the time that she wanted the account to be in trust for plaintiff. The account was so entered, and a pass-book given to S., containing an entry, in substance, that the account was with her in trust for plaintiff. A deposit was made in the same manner in trust for K. Plaintiff and K. were sisters, and distant relations of S. S. retained possession of the pass-books and the money remained in the bank with its accumulated interest, except that she drew out one year's interest, until her death. Plaintiff and K. were ignorant of the deposits until after that event. In an action to obtain possession of the pass-book and to recover the deposits.

*Held*, that the transaction was a valid and sufficient declaration of trust and passed the title to the deposits, S. constituting herself a trustee; that the retention of the pass-books, which were simply the vouchers for the property, must be deemed to have been as trustee, and was not inconsistent with the completeness of the gift, nor was notice to the *cestui que trust* necessary."

It is obvious that the foregoing is quite similar as to facts, and fairly expresses the principle declared in practically all of the well-considered cases.

It is, therefore, clear that Mrs. Luplow, as the owner and donor of personal property, could create a perfect or completed trust by her unequivocal declaration, in writing or by parol, that she herself held such property in trust for the purposes named, and the trust is equally valid whether she constituted herself or another person the trustee; she need not in express terms declare herself trustee, but she must do something equivalent to it, and use expressions that have that meaning. The act must be consummated and not rest in intention; if she constituted herself trustee, it is not necessary as between herself and the beneficiaries that she should part with the possession of the trust property. She declared her intention before the act, to deposit the money for the benefit of her children, then followed the act depositing the money in her own name "in trust for Richard and Maria;" subsequently she declared what she had done, and although

asked to do so, refused to change the manner of the deposit, and it so continued for more than eighteen years, which of itself indicates permanence of intention. So far as the record discloses she died without any intimation of a desire to make a change in the original arrangement, and it is not believed that the Court should now do that which she declined, although urged to do.

It must be found, therefore, that she created a voluntary express trust, which was completed by her *in presenti* by the deposit of the \$700 and the naming of herself as trustee.

The subject of gift which was presented in argument need not be further or separately considered, as it has been sufficiently discussed in the foregoing as a part of the trust.

It follows, therefore, that the judgment must be reversed, and it is so ordered.

METCALF and POLLOCK, JJ., concur.

**LIABILITY ESCAPED BY FAILURE TO SHOW KNOWLEDGE  
OF DEFENDANT.**

Court of Appeals for Hamilton County.

TAPHORN, Exrx., v. GOLAY, BY ETC.

Decided March 24, 1919.

*Directed Verdict—Defendant Entitled to, in Action for Negligence—Where Knowledge on His Part Has Not Been Shown.*

In an action against the proprietor of a butcher shop for damages for injuries received by an infant while playing with an electric meat-grinding machine, which it is alleged was being operated while unguarded, unprotected and unattended, it is error for the trial court to overrule a motion to direct a verdict for the defendant, where the evidence fails to show that the proprietor had knowledge of the presence of the infant in the shop. *Ziehm v. Vale*, 98 Ohio St., 306, distinguished.

*Hackett, Yeatman & Harris and Tyree, Jones & LeBlond*, for plaintiff in error.

*Gordon, Morrill & Ginter*, for defendant in error.

CUSHING, J.

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**Heard on Error.**

January 14, 1916, Edwin Golay, an infant seven years of age, entered the butcher shop of Joseph Taphorn, and was injured by placing his hand in the meat grinding machine. Golay claimed that Taphorn was negligent in that he permitted the electric meat grinding machine to run unguarded, unprotected and unattended, which machine attracted plaintiff, unable to realize the danger of playing with same, and that while playing with the meat grinding machine plaintiff placed his hand in the grinder so that his right hand and arm were mangled and crushed.

On entering the shop there was a space, 8 by 13 feet, provided for customers. At the left and rear of this space were counters. Between the ends of the counters was a passageway 26 inches wide, giving access to the rear of the store. The meat grinding machine, about 3 feet high, telephone booth and stove were in the space at the rear. Taphorn was back of the short counter waiting on a customer. After starting the grinder and placing meat in it, he went to another part of the store. The boy, Golay, came into the store, walked back of the counter, and, while Taphorn was either away from the grinder or was turning away from it, put his hand in the hopper and was injured. The record does not disclose that Taphorn, who died before the action was tried, knew that the boy was in the store or back of the counter near the grinder.

At the close of plaintiff's case, defendant moved for an instructed verdict. This motion was renewed at the conclusion of all the evidence, and overruled.

There was a verdict and judgment in favor of the plaintiff. Plaintiff in error contends that the verdict and judgment are contrary to law and not supported by any evidence.

This case differs from *Ziehm v. Vale*, 98 Ohio St., 306. There the automobile was standing on a public street and Ziehm knew that a boy four years old had been playing on the running board. After driving him off and starting the engine, he did not take the precaution to find out whether the child was on or near the automobile when he started it. In this case, Taphorn did not

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know that the boy was in the store. The motion for an instructed verdict should have been granted.

It is unnecessary to consider the other assignments of error.

On authority of *Railroad Co. v. Harvey* and *Swarts v. The Akron Water Works Co.*, 77 Ohio St., 235, and *Holbrook v. Aldrich*, 168 Mass., 15, cited with approval in *Erie Rd. Co. v. Hilt*, 247 U. S., 97, 101, the judgment will be reversed.

SHOHL, P. J., and HAMILTON, J., concur.

#### PROCEEDINGS TO SELL PROPERTY OF A RELIGIOUS SOCIETY.

Court of Appeals for Hamilton County.

WILANSKY, TRUSTEE, v. ANSCHE POLEN CONGREGATION ET AL.

Decided January 19, 1920.

*Jurisdiction—Not Conferred on the Superior Court—in a Proceeding to Sell the Property of a Religious Congregation.*

A proceeding under the proceedings of Section 10051, G. C., to sell property belonging to a religious society, is not an "action" within the meaning of Section 1571, G. C., conferring jurisdiction upon the Superior Court of Cincinnati.

*Cohen, Mack & Hurtig*, for plaintiff in error.

*Stricker & Johnson*, for defendants in error.

HAMILTON, J.

Heard on error.

The defendants in error here, plaintiffs below, filed a petition in the Superior Court of Cincinnati, praying for an order of court authorizing them or their successors to sell certain real estate and personal property described in the petition and belonging to the Anshe Polen Congregation. Two of the trustees joined in the filing of the petition, and one refused

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to join and was made a defendant. The trial court, upon a hearing, made a finding of facts, and conclusions of law, which are made a part of the record herein.

The jurisdiction of the superior court over the subject-matter was challenged by the plaintiff in error, defendant below, by demurrer to the petition. The demurrer was overruled and exceptions taken, which constitutes one of the claims of error in the case here.

Did the superior court have jurisdiction? If that court had such jurisdiction, it is conferred by paragraph 8, Sec. 1571 G. C., which reads:

"Every other action, when the defendant, or some one of the defendants, resides or may be summoned in the city of Cincinnati, except applications for divorce and alimony, or for alimony."

The question then is, Was this an "action"? If it was not an "action," the court had no jurisdiction over the subject-matter, as no general jurisdiction is conferred by statute upon the superior court. The jurisdiction given under the eighth paragraph of Sec. 1571 is limited to "actions."

Section 11237 G. C. defines an action, and is as follows:

"An action is an ordinary proceeding in a court of justice, involving process, pleadings, and ending in a judgment or decree, by which a party prosecutes another for the redress of a legal wrong, enforcement of a legal right, or the punishment of a public offense."

The proceeding in question was filed under the provision of Sec. 10051 G. C., which is the authority for the sale of property belonging to a religious society. The right of the trustees to file the petition is controlled by a majority of the members of the society. Every step in the proceeding to accomplish the purpose of sale is especially provided for by the statute. It can in no sense be considered an *ordinary* proceeding. It is not a proceeding whereby "a party prosecutes another." It was a proceeding not known to the common law, not to equitable procedure, and is purely a creature of statute. If the

trustees were agreed in making the application, and were a unit as petitioners, no adversary parties were necessary, yet they are required to proceed under Sec. 10051 G. C. to convey a good title. The only service required was to cause notice of the pendency of the petition to be published in some newspaper in the county where the real estate was situated, for four consecutive weeks before the application was heard. It is only in the sense of division on the part of the trustees that it could be considered as an adversary proceeding.

The general Code provides that a civil action is commenced by the filing of a petition and causing summons to be issued thereon.

The proceeding herein is not an ordinary proceeding. No summons is required to be issued. No party prosecutes another for the redress of a legal wrong. It is not the enforcement of a legal right. It is, in effect but asking authority to proceed in a certain way directed by statutes, to effect a sale of church property, that title may be conveyed. It is not the punishment of a public offense. The proceeding lacks the elements contained in Sec. 11237 G. C., defining an action.

We are of opinion, therefore, that this was in the nature of a special proceeding, and not an action. The superior court was without jurisdiction of the subject-matter, and the demurrer to the petition should have been sustained.

For error in overruling the demurrer, the cause will be reversed and a mandate issued to the superior court with instructions to sustain the demurrer and dismiss the petition.

SHOHL and CUSHING, JJ., concur.

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**WHEN A MINOR IS NOT BOUND BY THE ACT OF HIS GUARDIAN.**

Court of Appeals of Knox County.

**MARY B. SWETLAND ET AL V. HARRIET T. MILES.\***

Decided, January, 1920.

*Wills—Right to Contest a Will, Admitted to Probate in 1907, Sustained—Minor not Bound by Settlement Made by Guardian, When—Testimony of One Who Talked with Testatrix about Her Will not Admissible—Fraud and Undue Influence—Charge of Court.*

1. A granddaughter, upon attaining her majority, is not estopped from contesting the will of her grandmother by the fact that while she was a child of tender years the executors, one of whom was her guardian, distributed the available assets of the estate without filing an inventory or obtaining an order of distribution or filing any report thereof.
2. It is not error in a will contest to exclude the testimony of one who was called in by the testatrix to advise her as to whether the will as drawn properly expressed her wishes as to the distribution of her estate.

*C. H. Workman* for plaintiff in error.*L. C. Stillwell and R. L. Carr*, contra.

Heard on error.

SHEIELDS, J.

Suit was brought in the court of common pleas of said Knox county by Harriet T. Miles as plaintiff, defendant in error herein, against Mary B. Swetland et al, as defendants, plaintiffs in error herein, to contest the validity of the last will and testament of Phoebe Thompson, deceased. The petition was in the short form authorized by Section 12082, General Code. An order was duly entered on the journal of said court as provided, and upon

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\*Affirmed by the Supreme Court, January 18, 1921.

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the issue being submitted to a jury whether the writing produced was or was not the last will and testament of the said Phoebe Thompson, deceased, the verdict of the jury was that the same was not her last will and testament. Upon a motion for a new trial being overruled, judgment was entered upon said verdict and a petition in error was filed in this court seeking a reversal of said judgment.

The principal errors alleged are (1) that the court below erred in holding that the plaintiff below is not equitably estopped to maintain said action; (2) that said court erred in excluding the testimony of the witness, Calvin Trott, offered in behalf of the defendants below; (3) that said court erred in giving in its charge to the jury a certain proposition of law submitted in Request No. 3, hereinafter referred to; (4) that the verdict of the jury is against the weight of the evidence.

Copying the statement of counsel for plaintiffs in error as contained in their brief covering a chronological history of the case in respect to the execution of said will and the relation of the several plaintiffs in error and defendant in error hereto to each other and their relation as beneficiaries under said will, including the initial and partial distribution of said estate by the executors thereof, we have the following:

"Phoebe Thompson died June 7, 1907. The paper writing purporting to be her last will and testament was executed November 28, 1904, and probated December 31, 1907. She was survived by one daughter and three granddaughters, her husband, Dr. Thompson, having died some twenty years before her death. The surviving daughter, Mary T. Swetland, died in July, 1912. She was survived by two of the granddaughters of the said Phoebe Thompson, two of the defendants below—Anna E. Swetland Gotchall and Harriet T. Swetland. The other granddaughter, Harriet T. Miles, the defendant in error, is the daughter of Mrs. Charles E. Miles who died about the time of the date of the birth of the said Harriet T. Miles, October 29, 1896. At the time of her death the said Phoebe Thompson had two sons-in-law, Charles E. Miles, the father of the said Harriet T. Miles, and H. C. Swetland, the father of two of the plaintiffs in error, Anna E. Swetland Gotchall and Harriet T. Swetland.

"By the provisions of said will each of these two sons-in-law

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was bequeather the sum of \$1,000, and the surviving daughter, Mary T. Swetland, was bequeather all the shares of the capital stock of the said Phoebe Thompson in the First National Bank of Mt. Vernon, Ohio.

"That Charles E. Miles was the duly appointed, qualified, and acting guardian of the defendant in error, Harriet T. Miles, having been appointed as such guardian by the Probate Court of Franklin County, Ohio, December 20, 1897.

"Upon the probate of said will the said Charles E. Miles father of the defendant in error and her guardian, was, with the said H. C. Swetland, appointed and qualified as executors under said will, December 31, 1907. On February 17, 1908, said executors prepared an inventory of the estate of the said Phoebe Thompson, deceased, showing her personal estate to be \$32,572.07.

"That on or about January 20, 1908, said executors with the said Mary T. Swetland, who was named in said will as trustee of the residuary estate bequeathed to her said three granddaughters, met at the Thompson homestead and there and then some arrangement, understanding, agreement—some family arrangement, understanding or agreement was reached and concluded whereby there was a distribution of the assets of the estate of the said Phoebe Thompson, deceased, in the amount of \$15,000. The said Charles E. Miles, father and guardian aforesaid, took \$5,000 of the assets of this estate, and Swetland and his wife, or both, for their two children, took \$10,000 woth of the assets of the estate.

"At the same time or shortly thereafter, Charles E. Miles took or received his legacy out of the assets of said estate the sum of \$1,000, likewise said Swetland took his legacy of \$1,000; at the same time, likewise, Mary T. Swetland took the forty (40) shares of stock in the First National Bank of Mt. Vernon, Ohio, appraised at \$5,400, her legacy under the will. The \$15,000 distributed and divided by this agreement was not inventoried.

The foregoing statement embraces the facts upon which counsel for the plaintiffs in error claim the court below erred in holding that the same do not constitute an equitable estoppel against the plaintiff below and bar her from prosecuting this action. Although a child of tender years, a minor, at the death of her grandmother in June, 1907, which is conceded and although recognizing the saving clause in Section 10531, General Code, which gives to minors the right to contest a will within two years after attain-

ing their majority, counsel for plaintiffs in error contend that the defendant in error by and through the action of Charles E. Miles as her guardian, under the distribution made of said \$15,000, of the assets of said estate, as appears in the foregoing statement of counsel for plaintiffs in error, works an equitable estoppel against the said defendant in error as the ward of said guardian from contesting said will.

In their brief counsel for plaintiffs in error in commenting upon this branch of the case quote from the case of *Van Duyne v. Van Duyne*, 14 N. J., Eq., 49, wherein the Chancellor announcing the opinion in that case says:

"The rule in equity is well settled. A man shall not take any beneficial interest under a will, and at the same time set up any right or claim of his own, even if otherwise legal and well grounded, which shall defeat or in any way prevent the full effect and operation of every part of the will."

An examination of this case shows that a bill was filed to enforce a certain provision made in favor of the widow of the testator against certain real estate devised by him to his son, wherein the support of the widow was made a charge upon said real estate and the same was made subject to the support of the wife of the testator during her widowhood. By answer the son set up that he did not take said real estate by gift, but that he was a purchaser thereof for a valuable consideration, averring that he had rendered certain services to his father, the testator, after attaining his majority without receiving compensation therefor, and that the services so rendered were an equitable set-off against the value of said real estate so devised, and that therefore said real estate was not equitably chargeable with the support of said wife beyond the value of her dower therein. It is scarcely necessary to add that the defense here set up was held to constitute no defense to said bill. This is not new, but well settled doctrine, and it is quite apparent that the case cited is not applicable to or determinative of the question at issue here.

Counsel also cite in support of their contention the case of *Hamblett v. Hamblett*, 6 N. H., 333, decided in 1833, in which the

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first paragraph of the syllabus of the court in said case reads as follows:

"A party who has received a legacy under a will, can not be permitted to contest the validity of such will, without repaying the amount of the legacy, or bringing the money into court. And the rule applies even if the party was a minor when the legacy was received."

Upon its face, the case cited would seem to have some application to the case at bar. Although an old case running back as it does seventy-five years and more when decided, but as was well said by another, "the principles of the law when laid in reason never lose their force through the lapse of time." Let us examine the facts upon which this opinion rests. It appears that the action was based upon the will of David Hamblett executed December 30, 1816. An appeal was taken from the decree of the judge of probate in admitting said will to probate, to which an exception was taken on the ground that the testator did not have sufficient testamentary capacity at the time of its execution to make a will. It also appears that the appellant a short time before she became of age received the legacy given her upon said testator's will. Numerous questions arose upon the record, among them, the question as to whether the appellant should not have brought her legacy into court that she received under said will before proceeding to contest said will, and the court held that she should adding that "such affirmance, however, is not an absolute bar against the party seeking to contest the will though under circumstances of delay connected with other circumstances, it has been held to preclude the party from contesting the will afterward." As treating of the injustice of permitting one who has accepted and received a legacy under a will to hold it pending the outcome of a contest of such will, the judge announcing the opinion in said case says:

"True, the appellant when she received this legacy was a minor. But she was then, although not of legal age, of an age to exercise some discretion. She was then more than eighteen years of age, at which period her legacy was payable to her by the will. She was aided by her friends and connections and one of them

actually agreed to be bound that she should execute a release when she became of age. The legacy was fairly paid, and for aught which appears, the avails are still in her possession."

The main question raised in the case cited was on the motion for a rule requiring the appellant to bring into court the legacy received by her under the will before proceeding to contest its validity. What the statutory provisions of the state of New Hampshire relating to minors were at that time do not appear; nor does it appear that there was any statute in that state at that time containing any saving clause in favor of the disability of infants in the matter of contesting a will; nor does it appear that the appellant was under guardianship and under bond, but it does appear that said appellant was then more than eighteen years of age, "of an age to exercise some discretion" when her legacy was payable to her by the terms of said will, and when she was then legally entitled to be paid her said legacy. It was paid to her, accepted and receipted for by her, and she held it, and then attacked said will for the alleged reason of "the undutiful conduct of the appellee towards her mother in requiring her to render an account of her administration in the probate office, and in other matters specified." Can it be said that the case cited is decisive of the case at bar? Will it be claimed that the facts in the case cited run parallel to the facts in the case at bar? Here the defendant in error at the time her guardian received \$5,000 of the division made of the \$15,000 at the Thompson homestead was a mere child, incapable in law of acting for herself in any matters affecting her interests, whose keeping and care were in the custody of the law, confided to a trustee whose bond is her continuing security and protection and whose stewardship is controlled by law. In this connection we might mention Section 10939, General Code, by virtue of which probate courts are given special supervision over the estates of minors "to promote the faithful and correct discharge of the duties of guardians and to preserve the estates of minors for whom guardians are appointed" a provision intended to prevent the failure of guardians to do full duty in the administration of their trusts. Reverting to the New Hampshire case referred to, in that case the minor herself

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accepted and receipted for her legacy, but not so here. Presumably the defendant in error on account of her tender years knew nothing whatever of the transaction referred to at the Thompson homestead when said division was made in January, 1908, but it appears of record that up to that time, at least up to the time of the commencement of proceedings herein, she has not received a dollar of the sum so received by her guardian, nor does it appear that said guardian has accounted for the same or any part thereof. There being no opportunity afforded her for a return of the money so received by her guardian, of course she could not restore it to the estate, nor could she be called upon to do so. *Voglesang v. Null*, 67 Texas, 465-468; *Stull v. Harris*, 51 Ark., 294. Nor was there any ratification of the act of her guardian shown, but a prompt avoidance of the same upon her attaining her majority followed as evidenced by the commencement of proceedings herein.

Referring to the admission of the executors in dividing this estate to the extent of \$15,000 between themselves and not including the same in their inventory of the estate assets, it was claimed that they were led to make such division to avoid the payment of taxes thereon. It may be that such was their purpose, and if it was, it is unnecessary to add that such act was no less a violation of law and of trusteeship of estate property as well. Counsel for plaintiffs in error say "it was irregular but not illegal." We do not feel called upon to discuss the claim of the state upon estates for the payment of taxes, nor of the duties of executors in respect to trust funds. Suffice it to say that the distinction sought to be made here by counsel in this matter does not appeal to the judgment or conscience of this court. Continuing counsel add: "So that when Charles T. Miles collected the \$5,000 from himself and his co-executor he was simply doing his duty, and the legal duty done binds his ward." And the logic of this proposition, too, fails to commend itself to the approval of the court. An examination of this record shows that within a few days after their appointment and qualification, these executors, acting without bond, assembled the more available assets of this estate and parceled them out between themselves and the

trustee of the residuary estate of said granddaughter, without any order or sanction of the court having jurisdiction over the distribution of estates, and without even making any return to said court of an inventory of such assets or of such distribution. The statutes plainly point out the manner of making distribution of the assets of the estate of a deceased person, and it is enough to say that these statutes were not followed in this instance. Further, we dissent from the conclusion stated by counsel that such act of the guardian "binds his ward." While the authorities in all jurisdictions are not in accord upon this subject, we believe the general rule is sustained by the weight of authority and upon reason, that the guardian can not thus bind his ward, and we therefore hold that the defendant in error is not equitably estopped from maintaining this action to contest said will: 22 Cyc. 512 and cases cited; *Hazzard v. Kelly*, 96 O. S., 19; *Lanning v. Brown*, 84 O. S. 385.

The second ground of error alleged is the rejection of the testimony offered by the witness Calvin Trott, called to testify on behalf of the plaintiffs in error, to a certain conversation had between himself and the said Phoebe Thompson, deceased, in reference to the latter's will after the same has been drafted by one R. R. McIntire, when the said Trott was called into the house of the said deceased to examine said will and inform her if the same properly stated and embodied her requests as made known to him. The questions propounded to said witness were as follows:

"Q. \* \* \* \* Now did you have a talk with Mrs. Thompson there about this will? \* \* \*

A. I did.

Q. Now the question! You may state what she said and what you said."

On objection being made the same was sustained by the court below and exception duly taken. The question made is simply one involving the competency of the witness to testify to the conversation referred to. That the witness Trott was considered by the deceased as her attorney in relation to her will is apparent. Was the conversation referred to competent? If it was, it is

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conceded that it falls within the exception named in Section 11494, General Code, and which reads as follows:

"An attorney, concerning a communication made to him by his client in that relation, or his advice to his client; or a physician, concerning a communication made to him by his patient in that relation, or his advice to his patient. But the attorney or physician may testify by express consent of the client or patient: and if the client or patient voluntarily testifies, the attorney or physician may be compelled to testify on the same subject."

While in its final analysis the determination of what appears to be the issues as made by the evidence in the case tending to show want of testamentary capacity on the part of the testatrix and undue influence upon her, is not to be lost sight of, still the question here presented is one of the competency of testimony arising out of a confidential relation created by the act of the parties which is protected by law, unless it falls within the exception enumerated in said Section 11494. True, the testimony offered, if introduced, may have thrown light upon the state of mind and the expressed wishes of the testatrix, but the law has wisely placed a ban upon and excluded communications between attorney and client pending professional relations, unless the party expressly waives such privileged communications. In their exhaustive research, counsel for plaintiffs in error cite us to numerous decisions of courts of last resort of various states holding—(1) that an attorney may testify to communications made to him by a deceased client upon a contest of the validity of the will of such deceased client; and (2) that in a will contest a waiver of any disability growing out of the confidential relation and privileged communications made to an attorney by a deceased client may be made by the personal representative, executor or administrator. But it must be remembered that we have in this state a statute prescribing a rule of evidence in this class of cases, which has been construed by the Supreme Court of this state, and whose decision is controlling with this court. Decisions in other states are persuasive and useful only when the Supreme Court of this state has not passed upon the same or like questions presented for solution, but when so passed upon and adjudicated.

cated, such adjudication is to be followed by inferior courts. The case referred to is the case of *Ausdenmoore et al, Executors, v. Holzbach*, 89 O. S., 381, which we think is decisive of the principle involved in the question raised here. In that case the contention arose over the question of "the admissibility of the evidence of certain physicians touching the nature and seriousness of the injuries of the plaintiff below," and the court in considering the exceptions mentioned in said Section 11494, namely, "but the attorney or physician may testify by express consent of the client or patient, and if the client or patient voluntarily testifies, the attorney or physician may be compelled to testify on the same subject," placed the following construction on said exceptions and held:

"This qualifying clause we hold to mean that there can not be a waiver except in two ways: First, by an express consent to the patient, or by the patient taking the stand and voluntarily testifying as to the things and matters communicated to his physician, the latter being held to be in effect an express waiver as to that physician. There being no express waiver nor any testimony by the plaintiff, touching the things and matters communicated to such physician, whose testimony was excluded, we find there was no error."

Here, as there, no express waiver was shown, not even a syllable of testimony having been offered to show that such communication was authorized by the deceased. Her lips were closed in death, and she could not be heard to testify. Of course it is unnecessary to add that the situation would have been different had the witness Trott signed said will as a witness, in which event he would have been released from the operation of said statute. *Baird v. Dietrich*, 28 O. C. A., 257.

Following the decision of the Supreme Court in the case referred to, we hold that the action of the court below in excluding the testimony offered by the witness Trott was proper and that the same was not erroneous.

It was also contended on behalf of the plaintiffs in error that the court below erred in its charge to the jury, especially in giving what is designated as Request No. 3, which reads as follows:

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"Fraud is in its nature closely allied to undue influence and it is practically impossible to distinguish the two as the same evidence often tends to support each charge."

The foregoing appears to be an extract from the text of Page on Wills, Section 122. and which appears to be supported by authorities cited in a note.

As we had occasion to remark at the outset of this opinion, the form of petition filed herein is authorized by statute, and while there may exist a division of opinion in the profession as to the propriety of such legislative enactment—overturning and setting aside as it does, in the opinion of many, the rules of pleading formally observed in such cases—it is a form of pleading authorized by statute and therefore adopted and followed: As was said by Judge Williams, speaking for the court, in the case of *Dew et al v. Reid et al*, 52 O. S., 519, (which was a will contest case):

"While that issue may be made up either by the pleadings, or by an order entered on the journal of the court, it must, whichever the mode adopted, be the broad issue required by the statute, whether the instrument produced is the valid will of the alleged testator; and, as the proof may be commensurate with the issue, any competent evidence tending to prove that, for any reason, it is not his valid will, is admissible, and should receive proper consideration by the jury."

Hence the door is wide open for the admission of any competent evidence tending to prove the issue. Just how far the question of fraud may be removed from the question of undue influence in a will case may be difficult of intelligent solution. Indeed the history of litigation of this character often-times shows that they are closely allied—so much so that they may be termed close neighbors, but whatever the fact, such fact does not lessen the duty of the trial court to properly instruct the jury in relation thereto. Here it was claimed on the part of the plaintiffs in error that fraud was not charged, nor was it shown upon the trial, the contrary being claimed on the part of the defendant in error. While we recognize the general rule that the jury should be instructed with reference to the issues in the case on trial, and not

be given in abstract and general terms, when such terms may mislead the jury, and further, that it is error to introduce into a charge an instruction on an issue not raised by the pleadings or evidence, we are far from being persuaded that a reading of the evidence contained in the bill of exceptions in this case does not furnish sufficient ground for the instruction given and as given At best, we do not think said instruction can be considered as prejudicially affecting the interests of the plaintiffs in error in this action.

As to the remaining ground of error, namely, that the verdict of the jury is against the weight of the evidence, it is a sufficient answer to this to say that the record herein does not make a case to warrant the interference of the court on this ground.

The judgment of the court of common pleas is affirmed.

HOUCK, J. and PATTERSON, J., concur.

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**NO APPEAL WHERE WORKMAN IS INJURED OUTSIDE  
OF THE STATE.**

Court of Appeals for Hamilton County.

**THE INDUSTRIAL COMMISSION OF OHIO, WALLACE D. YAPLE,  
M. B. HAMMOND AND T. J. DUFFY, COMPRISING  
SAID COMMISSION, v. LEENA WARE.**

Decided, June 18, 1917.

*Workmen's Compensation—Common Pleas Court Without Jurisdiction  
on Appeal—Where Injury Occurs to an Employee of an Ohio Con-  
tractor—Engaged in Work Outside of the State.*

There is no appeal from the decision of the Industrial Commission in the case of an injured employee of an Ohio contractor who has contributed to the state insurance fund, where his injury occurred outside of the state but while in the course of his employment.

*John V. Campbell, Prosecuting Attorney, and Henry G.  
Hauck, Assistant Prosecuting Attorney, for plaintiff in error.  
Fulford, Shook & Wilby, contra.*

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**HAMILTON, J.**

Heard on petition in error to the Common Pleas Court of Hamilton County, Ohio.

This case had its origin in an application for compensation under what is known as the workmen's compensation law filed with the Industrial Commission of Ohio because of the death of one Sam Ware, husband of the defendant in error and employee of the firm of Platt & Dickinson, who were contributors to the compensation fund.

Ware met his death in the course of his employment, July 30, 1915, in the city of Covington, Kentucky, his employers being brick-work contractors of Cincinnati, Ohio. Lena Ware, wife of the deceased Sam Ware, made claim as the wife and dependant of the said Sam Ware.

Among other facts, it appeared that the said deceased Sam Ware and the wife, Lena Ware, had not lived together for about four and one-half years. The industrial commission denied the right of the said Lena Ware to participate in the compensation fund, and she thereupon, as such claimant, appealed to the Common Pleas Court of Hamilton County, Ohio, where her appeal was tried to the court, a jury having been waived, resulting in a judgment in her favor.

Several questions of error are urged by plaintiffs in error as grounds of reversal, but the controlling question is, did the common pleas court have jurisdiction to entertain the appeal and hear the cause, it being admitted that the place of injury was in the state of Kentucky.

Section 1465-90, paragraph 43, provides as follows:

"The board shall have full power and authority to hear and determine all questions within its jurisdiction, and its decision thereon shall be final. Provided, however, in case the final action of such board denies the right of the claimant to participate at all in such fund on the ground that the injury was self-inflicted, or on the ground that the accident did not arise in the course of employment, or upon any other ground going to the basis of the claimant's right, then the claimant, within thirty (30) days after the notice of the final action of such board, may, by filing his appeal in the common pleas court of the county

*wherein the injury was inflicted,* be entitled to a trial in the ordinary way, and be entitled to a jury if he demands it. In such a proceeding the prosecuting attorney of the county, without additional compensation, shall represent the state liability board of awards, and he shall be notified by the clerk forthwith of the filing of such appeal." \* \* \*

The only right of appeal from the decision of the industrial commission is contained in this statute, and it can be conferred only by statutory provision. The plain wording of the statute is to the effect that the appeal must be filed "in the common pleas court of the county wherein the injury was inflicted," and it being admitted and shown to be the fact that the injury in this case was inflicted in the state of Kentucky, it becomes at once apparent that the decision of the board was final.

There being no appeal provided for such a case as the one at bar, the common pleas court erred in entertaining the appeal and rendering a judgment therein, was without jurisdiction and its proceedings are null and void. It follows that the judgment of the common pleas court must therefore be reversed, and its judgment and proceedings held for naught.

JONES, P. J., and GORMAN, J., concur.

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**ADMISSIBILITY OF ATTEMPT BY COUNSEL OF THE ACCUSED  
TO BRIBE WITNESSES.**

Court of Appeals for Butler County.

**MEFFORD v. STATE.**

Decided, August 5, 1920.

*Criminal Law—Evidence as to Attempt of Counsel of the Accused to Bribe Witnesses Inadmissible, When.*

In a criminal prosecution it is error to admit evidence of an attempt by the attorney for the accused to bribe witnesses or suppress evidence against the accused, where it is not proven that the accused was connected with such attempt.

*Edgar A. Belden and U. F. Bickley, for plaintiff in error.  
Isaac C. Baker, Pros. Atty., for defendant in error.*

Heard on error.

**BY THE COURT.**

Harold Mefford was jointly indicted with several others for robbery in Butler county.

The evidence showed that two Italian workmen were enticed by a woman, one of the defendants, to a saloon late one night, and, after leaving it, they were set upon and robbed by several men. The Italians were unable to identify Mefford, and the direct evidence of his participation in the crime was furnished by those who had been his co-defendants. All of the other persons indicted pleaded guilty and Mefford alone stood trial. In the course of the introduction of the evidence on the part of the state the witnesses were allowed to testify that U. F. Bickley, who appeared as one of the attorneys for the defendant at the hearing, had said to the witness: "If you don't come up and testify before the grand jury against Mefford, I'll help you out"; "if you plead not guilty, they can't prove it," "you ain't guilty until you are proved guilty." Similar testimony was

given by several witnesses in respect to the conduct of the attorney, all over the objection and exception of the defendant.

If the attorney had attempted corruptly to suppress evidence, his conduct would have constituted an offense under the criminal law of the state. Section 12866, G. C.

There was no testimony tending to connect Mefford with the alleged action on the part of his attorney. A client is not responsible for any illegal action taken by his attorney, which he did not advise, consent to, or participate in, and which was not justified by any authority he had given. 6 Corpus Juris, 661.

Attempts by persons other than the accused to bribe witnesses, or otherwise to suppress or manufacture evidence, are evidence against the accused when, but only when, it is proven that he was connected with such attempts. Acts and statements of third persons, not known or authorized by him are inadmissible. 16 Corpus Juris., 556.

In view of the failure to connect Mefford with the statements, it was error to admit the evidence. It was of such character that its admission could not fail to have prejudiced him. Attempts to suppress evidence indicate a consciousness of guilt, and if proved to have been made by defendant are highly probative of criminality.

In view of the entire record the court does not find the judgment to be manifestly against the weight of the evidence.

For the error in admitting the testimony of the alleged statements of Bickley, the judgment will be reversed and a new trial ordered.

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Muskingum County.

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**REPLEVIN FROM PURCHASER OF PROPERTY COVERED BY  
CHATTEL MORTGAGE.****JOHN W. KELLER v. T. OSCAR EVANS.**

Court of Appeals for Muskingum County.

Decided, April 15, 1920.

*Caveat Emptor—Doctrine of, Applied to Purchaser of a Mortgaged Chattel Upon Which he had Expended Money, but which Could Still be Identified—Replevin.*

The mortgagee of an automobile, which has been sold without his knowledge or consent, may replevin the machine from the purchaser, notwithstanding permanent repairs have been made thereon by the purchaser.

*A. A. George*, for plaintiff in error.*E. R. Meyer*, for defendant in error.**HOUCK, J.**

The proceeding in this court is one in error and comes here from the common pleas court of this county.

The suit below was one in replevin. T. Oscar Evans, the defendant in error here (plaintiff below), brought his suit in replevin against John W. Keller, plaintiff in error here (defendant below), claiming the possession of one No. 37 touring car, serial No. 371,537, with extra tire, tools, and standard equipment.

The following are the conceded facts.—

1. Plaintiff below, on April 24, 1917, sold the car with equipment, to Lawrence Wilkinson and Jennette Wilkinson, at Akron, Ohio.
2. The Wilkinsons resided at Akron at that time.
3. As part of the purchase price of the car, Wilkinson and his wife executed and delivered to plaintiff a promissory note in the sum of \$350, payable in monthly installments of \$30 each.
4. At the same time, they executed and delivered to plaintiff a chattel mortgage conveying to him the car.

5. The chattel mortgage was duly filed with the recorder of Summit county, Ohio, on May 3, 1917, at eleven o'clock in the forenoon.

6. The chattel mortgage contained a condition, in substance, that if Wilkinson and wife should pay the sum and interest at the time and manner mentioned, and shall keep and perform the covenants and agreements contained in the chattel mortgage, the same should be void but otherwise to remain in full force; that in case of default in payment of said money at the time or times at which the same should be due and payable, or if the Wilkinsons should remove the goods and chattels, or any part thereof, the plaintiff should have the right to take possession of the property and sell the same.

7. Without the consent and without the knowledge of plaintiff, the Wilkinsons removed the car from the county of Summit and sold it to Keller.

8. Keller put permanent repairs on said automobile in a sum amounting to \$176.87.

Question:—Will replevin lie in the instant case as against the permanent repairs placed on said automobile by Keller?

This we answer in the affirmative. Under the conceded facts in this case, we are bound to answer the inquiry just as we have—in the affirmative. The doctrine of *caveat emptor* certainly applies to Keller. He was bound to know that the seller of the automobile was the owner of it, and if he purchased it (although in good faith) when in fact the seller had no right to dispose of it, he can not claim title by reason thereof. If, after getting possession of the automobile, in question, he placed repairs on a car the ownership of which was in some person other than the one who claimed to be the owner at the time Keller purchased it and of whom Keller claimed to have purchased, he (Keller) placed such repairs thereon at his own peril and, as against the rightful owner of the car, can not legally hold the permanent repairs placed thereon.

It is, however, a settled rule of law (violated, however, by the statute relating to replevin), that no man can be deprived of his property by another without his consent; and if he elects to follow and reclaim it, whether owner or not, if entitled to the immediate possession, he may obtain possession by an action of re-

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plevin, into whose hands soever it may come, whether the person from whom he reclaims it, or the person who enhanced its value, was a willful or involuntary trespasser. But, in such case, the property must be identified; for if its identity is lost by being converted into another species, or otherwise, an action of replevin can not be maintained.

In the case at bar, the property was not changed into another species, but simply enhanced in value by the accessions placed thereon by the trespasser, Keller. Hence, under such circumstances, Evans, the owner and the one entitled to the possession of the said automobile, can not be compelled to pay Keller, the trespasser, for the improvements on said automobile, as the law neither divests Evans of his property nor requires him to pay for such improvements made without his consent, approval, or authority.

It, therefore, follows that the judgment of the common please court is right and should be affirmed.

Judgment affirmed.

Shields, J., and Patterson, J., concur.

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#### CONSTRUCTION OF THE BULK SALES STATUTES.

Court of Appeals for Seneca County.

JOHN FAYES v. PETER KIEFFER, CONSTABLE, ETC., ET AL.

Decided, March 22, 1921.

*Bulk Sales—Creditors Who File an Application to have a Trust Declared—Entitled to Benefit under Section 11103-1.*

Only such creditors as comply with Section 11103-1 may question a bulk sale of a stock of merchandise unless it is made in fraud of creditors.

Hughes, J., Crow and Warden, JJ., concurring.

The plaintiff brought an action against the defendant as constable, to recover possession of a stock of goods held by the constable under a writ of attachment.

The judgment below was in favor of the defendant and the parties have in this court, by written agreement conceded the facts upon which the lower court entered this judgment, to be in substance as follows:

One Williams sold to plaintiff, his entire stock of goods, groceries and fixtures without complying with the bulk sales statutes of Ohio.

A creditor of Williams, about forty days after the sale to Williams, brought an action of attachment and the constable took possession of these goods thereunder, upon the theory that the sale of the goods by Williams to Fayes was void under Section 11103-1.

There were no steps taken by this creditor or any other creditor, in the court of common pleas or any other court having jurisdiction, to have the purchaser Fayes declared a trustee, accountable to the creditors of Williams.

If we had no bulk sales statutes in Ohio, this sale and delivery of the goods to Fayes by Williams would be a valid sale, and no creditor could attack Fayes' title without showing that it had been made in fraud of creditors, which is not claimed here.

We are quite clear that the only creditors for whom such a purchaser as Fayes might be made the trustee and held accountable to, are the creditors, and those creditors only, who file their application under Section 11103-1, General Code, in the proper court to have the trust declared.

That this is the correct interpretation of our bulk sales statutes we think is made manifest by the judicial pronouncements. 10 Ohio Appellate Report, 45; 31 O.C.A., --; 100 Ohio State, 58.

Upon authority of these two cases we are quite satisfied that the judgment of the court below is contrary to law and that the motion for new trial should have been allowed upon that ground.

Judgment reversed.

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**NO APPEAL FROM ORDER APPOINTING ADMINISTRATOR.**

Court of Appeals for Monroe County.

LUBURG ET AL v. LUBURG.\*

Decided, April 28, 1920.

*Administrator—Common Pleas Court Without Jurisdiction on Appeal from Appointment of by Probate Court.*

The General Code of this state does not give a right of appeal to the common pleas court from an order of the probate court appointing an administrator.

*R. F. Sears, for plaintiff in error.*

*Moore, Devaul & Moore, for defendant.*

POLLOCK, J.

This is an action in error seeking to reverse the judgment of the court of common pleas of Monroe county in the matter of the appointment of an administrator of the estate of Wesley Luburg.

The only question before this court is whether the common pleas court had jurisdiction on appeal over the subject-matter of this action.

Some time in May, 1919, the plaintiffs in error, who are heirs of Wesley Luburg, deceased, late a resident of Monroe county, filed an application in the probate court asking for the appointment of an administrator of the estate of said Wesley Luburg. Citation was had upon the remaining heirs of the deceased, and, on hearing in the probate court, Susan Hendershot, a daughter, and one of the heirs of Wesley Luburg, was appointed administratrix of his estate.

After the judgment of the probate court, the defendant in error, John C. Luburg, gave notice of appeal, filed a bond, and

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\*Motion to direct the Court of Appeals to certify its record in this case overruled by the Supreme Court, June 28, 1920.

caused the matter resulting in the appointment of an administratrix to be appealed from the probate court to the common pleas court.

The only heirs or parties to the proceeding in probate court who appeared in the common pleas court in the matter thus appealed were the plaintiffs in error, who filed a motion asking, among other grounds, that the appeal be dismissed for the reason that the common pleas court had no jurisdiction over the action on appeal.

The motion was heard in the court of common pleas, and overruled.

Afterwards the matter came on to be heard in that court, resulting in a judgment refusing to appoint an administrator of this estate.

In the argument something has been said in regard to the regularity of the proceedings in the probate court.

The question of the regularity or irregularity of the proceedings in the probate court is not now before this court.

The administratrix, and some of the heirs of this estate who were cited to appear in probate court, did not appear in the common pleas court, and were not made parties to this action in error, and it is urged that this being true this court does not have all the parties before it necessary to a hearing on the petition in error and that for this reason this action should be dismissed.

These parties were not required to appear in the court of common pleas if they did not wish to. No pleadings were filed in that court, and none are required. We have before us in this proceeding only the parties who appeared and took part in the proceedings in the common pleas court. If there were other issues than that of jurisdiction, a serious question might arise whether this court did have proper parties before it, but if the common pleas court had no jurisdiction of the subject-matter its judgment is void, and whether all the parties who were parties in the probate court are now before the court or not is immaterial, as the judgment rendered by the common pleas court would have no legal effect and does not bind anyone. Freeman,

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Judgments (4 ed.), Sec. 17; 1 Black, Judgments (2 ed.), Sec. 218, and 7 Ruling Case Law, p. 1042, Sec. 75.

Any party interested in the proceedings in the probate court to appoint an administrator of the estate of Wesley Luburg had a right to appear in the court of common pleas and challenge the jurisdiction of that court over the subject-matter, and, if defeated, to prosecute error to this court.

The claim is made by the defendant in error that Sec. 10859 G. C. gives the common pleas court jurisdiction on appeal over the appointment of an administrator. This section reads as follows:

"From any order, judgment, or decree of the probate court, an appeal may be taken to the court of common pleas, by any person against whom it is made, or who is affected thereby, in the manner provided in other cases. Bills of exceptions may be taken and allowed upon any decision of the probate, common pleas or circuit court, in such proceedings as in other cases."

The right of appeal exists only by virtue of the statute. In order to give the appellate court jurisdiction, the statutory provision must be strictly followed. *Browne v. Wallace*, 66 Ohio St. 57.

Viewed alone the terms of the section of the General Code just quoted would seem to give the right of appeal to the common pleas court to any person against whom any order, judgment or decree of the probate court had been entered.

A court would hesitate to give a construction to this statute that would allow a dissatisfied litigant to appeal from any order or judgment that the probate court might enter. So that a court should look farther than the mere language of the statute before placing such a broad construction upon this section.

This section was a part of Sec. 9 of act 54 O. L. 202, providing for a speedy collection by an heir of his interest in an estate after an order of distribution had been entered. At the time of its enactment the section was a part of that act of the Legislature, and the right to appeal which it gave only included the actions provided for in that act. First came the revision

which resulted in the Revised Statutes, and since then we have had the further revision now known as the General Code.

The act above referred to now appears in the General Court beginning with Sec. 10848 and ending with Sec. 10860. While that act has been changed in some minor particulars by revisions and amendments, yet the purpose and object of the act remain the same as in the original enactment.

This section should be construed in connection with the act of which it forms a part, and be limited to its original intention, unless by the revision, or the amendments to it, it reasonably appears that the Legislature intended to give it a wider application. It does not appear from any change in the form of the act, or of this section, that the Legislature intended to extend the right to appeal under this section so as to include any orders or judgments of the probate court not embraced in the original act.

After the revision embodied in the Revised Statutes, this section became Sec. 6203, and the Supreme Court, in *Ebersole v Schiller*, 50 Ohio St., 701, construed it as follows:

"Section 6203 Revised Statutes, must be construed in connection with the act of April 17, 1857 (S. & C., 619), of which act it formed a part before the revision of the statutes; and, when so construed, it gives no right of appeal to the court of common pleas, from an order of the probate court refusing to remove an administrator."

The question of the effect upon a statute which has undergone revision was before the supreme court in the case of *State v. Shelby Co. (Comrs.)* 36 Ohio St., 326, the court holding that unless the language of the new act plainly requires a change of construction to conform to the manifest intention of the legislature, the same construction will prevail as before revision.

This rule was not modified by the supreme court in the case of *Collins v. Millen*, 57 Ohio St., 289 [48 N. E. 1097]. That case only holds that where, in the general revision of the statutes, a clause is added to a section thereof, the plain and ordinary effect of which is to qualify the former operations of the section, such effect should not be denied on the ground that it was added in

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the course of a general revision of the statutes. This, in no way, however, modifies the former rule that unless such a clause appears, the original construction should be placed upon the section.

Our attention has been called to the case of *Union Savings Bank & Trust Co. v. Western Union Tel. Co.*, 79 Ohio St., 89, [86 N. E. 478; 128 Am. St. 675; 30 O. C. C. 390], in which it is claimed that Davis, judge, in the opinion holds that the right to appeal to the common pleas court does exist from an order appointing an administrator. The judge, at page 100 of that case, uses the following language:

"The defendant, if it had such an interest in the estate as would give it the legal standing to do so, might have attacked the appointment in the probate court, or by appeal or error."

In order to determine the effect that should be given to this remark found in the opinion we must look to the question then before the court. The court had before it the question of whether or not the appointment of an administrator by the probate court, where it was claimed that the administrator appointed had no legal right to act as such administrator, could be attacked in a collateral proceeding. After holding that because the probate court had jurisdiction over the appointment of an administrator of an estate, and that the appointment regularly made by the probate court could not be collaterally attacked, the court used the language above quoted.

We do not think the remarks found in the opinion are determinative of the question. The supreme court did not have the question of the right of appeal before it at that time, and the remark was wholly obiter, and was made, no doubt, by the learned jurist without having fully considered at that time the statutory provisions giving a right of an appeal from the judgments and orders of the probate court to the common pleas court.

The only other provision of the statutes, authorizing an appeal from the probate court to the common pleas court, is Sec. 11206 G. C. This section fails to provide for an appeal from an

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[31 O.C.A.]

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order of the probate court appointing an administrator of an estate.

We think that the common pleas court was in error in overruling the motion to the jurisdiction of that court. The judgment of the common pleas court is reversed.

METCALFE and FARR, JJ., concur.

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**EFFECT OF FAILURE TO SPECIFY QUALITY OF GAS TO BE  
FURNISHED UNDER A MUNICIPAL FRANCHISE.**

Court of Appeals for Summit County.

STUVER v. EAST OHIO GAS CO. ET AL.

Decided, November 12, 1920.

*Municipal Corporations—Franchise Ordinance to a Gas Company—Rendered Invalid by Failure to Specify Quality of Gas to be Furnished—Public Utilities Statute Inapplicable.*

1. A franchise ordinance granting to a gas company the right to furnish gas to the inhabitants of a municipality at a certain stipulated price, but which fails to specify or make any reference to the quality of gas to be furnished, is in contravention of Section 3989, General Code, and invalid and its performance may be enjoined.
2. The provisions of Section 3989, to the effect that municipalities shall not contract for the furnishing of gas to their inhabitants, unless the agreement shall specify the exact quality of gas to be furnished, are not affected or rendered inoperative by the statutes relating to the public utilities commission.

*Musser, Kimber & Huffman*, for plaintiff in error.

*Slabaugh, Young, Seiberling, Huber & Guinther*, for defendants in error.

WASHBURN, J.

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## Heard on error.

On August 16, 1920, the village of Kenmore passed an ordinance granting a franchise to the East Ohio Gas Company, to construct, etc., pipes in the streets of said village, and supply to the inhabitants of said village manufactured or artificial gas, charging such inhabitants a certain price therefor, said price being agreed to and stipulated in the ordinance. But such ordinance did not specify the quality of gas to be so furnished, or make any reference thereto.

On October 20, 1920, the plaintiff, having duly requested the city solicitor to bring the action, which he refused to do, brought this action to declare such ordinance invalid, and to enjoin said village and said gas company from undertaking to perform or operate under such ordinance.

In the court below a demurrer was sustained to the petition, and, the plaintiff not desiring to further plead, judgment was rendered against him, dismissing his petition. He now prosecutes error proceedings in this court to reverse that judgment.

By Section 4311, G. C., it is made the duty of the city solicitor to bring injunction proceedings in a court of competent jurisdiction to restrain "the execution or performance of any contract made in behalf of the corporation in contravention of the laws or ordinance governing it;" and upon his refusal to perform such duty such suit may be brought by a taxpayer. Section 4314, G. C.

Said franchise ordinance having been duly accepted by said gas company, there can be no doubt but that it constitutes a contract between the village and said company. *Cincinnati v. Public Utilities Commission*, 98 Ohio St., 320. The claim of the plaintiff is that such contract was entered into in contravention of a law governing said village, that is, Sec. 3989, G. C. which provides that the council of such village "shall not agree by ordinance, contract, or otherwise, with any person or persons for the construction or extension of gas works for manufacturing or supplying the corporation or its inhabitants with gas, \* \* \* which does not specify the exact quality of the gas to be fur-

nished, and reserve to the council the right to enforce and exact compliance with such specification, under such rules as the council may prescribe."

It is conceded that this statute, in the respect mentioned, was wholly and totally ignored; it would seem, therefore, that this action, being specifically authorized, and having been promptly brought, the plaintiff is entitled to the relief sought, unless there are other and later statutes which modify or change or render inoperative the plain provisions of Section 3989, and it is the claim of the defendants that such is the case.

It is admitted that Section 3989 is not specifically amended or changed, nor referred to, by any other or later statutes, but it is claimed that insomuch as "merchantable gas" is defined by other statutes (Sec. 9331, G. C.), and power given the Public Utilities Commission of Ohio to ascertain and fix adequate and serviceable standards for the measurement of quality, pressure, initial voltage or other condition pertaining to the supply or quantity of the product or service rendered by any public utility (Sec. 614-36, G. C.), that therefore such statutes enter into and become a part of the Kenmore contract, and the obligation of the gas company is to be measured and performance regulated by the terms and rules they prescribe.

We have examined the statutes relating to the public utilities commission, and the cases in the supreme court construing the same, and are of the opinion that such statutes do not take away from municipalities the right to enter into contracts with public utilities, relative to the furnishing by the latter of gas and other commodities to their inhabitants, and that, while the public utilities commission is granted certain powers over public utility companies and the service rendered by them, still, the commission is a board of special and limited jurisdiction and has no power to exercise any jurisdiction beyond that expressly conferred by the statute, *Cincinnati v. Public Utilities Commission*, 96 Ohio St., 270, that it has no power to confer franchises or make contracts which shall be effective between a municipality and a public utility, or between other parties, *Oak*

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*Harbor v. Public Utilities Commission*, 99 Ohio St., 275, and that, where contracts are entered into between municipalities and public utility companies, in accordance with the statutes which confer authority to so contract, said contracts are binding on both parties thereto, subject in certain contingencies, to the right of one per cent. of the qualified electors to appeal within sixty days to the commission as provided in Sec. 614-44, G. C. *Ohio River Power Co. v. Steubenville*, 99 Ohio St., 421. The appeal provided for in Section 614-44, General Code, is confined to the subject of price, and is otherwise limited in its application. *Cincinnati v. Public Utilities Commission*, *supra*.

Moreover, municipalities are expressly authorized to enter into contracts of this character by Art. 18, Sec. 4, of the Constitution, as amended in 1912; the right to contract for the product or service of a public utility necessarily includes the right and authority to agree upon the quality of the commodity to be furnished by such utility, and if the statutes in reference to the utilities commission should be construed so as to take that right away from municipalities, and vest the entire control of the matter in the utilities commission, such statutes would be clearly unconstitutional. The Supreme Court, in a recent decision, not cited to us, reiterates its former holding that where a gas company enters into a contract with a municipality, and agrees to furnish a service to the inhabitants of the municipality, such contract is binding upon the parties, and the utilities commission is not vested with authority to relieve the gas company of the obligations assumed by it in such contract; and reiterates its former holdings that the powers of the public utilities commission are conferred by statute and it possesses no authority other than that thus vested in it. *Lima v. Public Utilities Commission*, 100 Ohio St., 416.

We do not find that the statutes creating the public utilities commission specifically or by necessary implication repeal Section 3989. Therefore a contract entered into between a municipality and a utilities company in violation of the plain provisions of Section 3989 is illegal, and, upon timely objection

thereto, should be so declared by the court. For the protection of the public, that statute provides that the municipality shall not agree, by ordinance, contract or otherwise, for the manufacturing or supplying of gas to the inhabitants of the municipality, unless such agreement shall "specify the exact quality of the gas to be furnished." Notwithstanding the fact that the utilities commission is granted certain supervision and power over the service to be rendered under such contract, still the inhabitants have a right, in the first instance, to have the contract specify the quality of gas to be furnished, so that their rights in that particular may be fixed by agreement and they may be in a position to claim the protection of their rights in any future proceedings before the utilities commission.

For the reasons indicated, we are of the opinion that the court below committed error in sustaining the demurrer and dismissing the petition in this case, and for that reason, the judgment is reversed.

DUNLAP and VICKERY, JJ., concur.

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**LIABILITY OF HUSBAND FOR SUPPORT OF WIFE WHO HAS ABANDONED THEIR HOME.**

HARDY v. SMITH.

Judge Patterson of Fifth District sitting in place of Judge Dunlap.

Court of Appeals for Cuyahoga County.

Decided, October 29, 1920.

*Husband and Wife—Husband not Liable to Father-in-law for Support of his Wife—Where she Abandoned without Sufficient Cause the Home Provided by the Husband.*

1. A wife is not justified in abandoning the home provided by her husband so as to render him liable for support furnished her by her father, because of the presence of others in such home whom it was agreed before marriage should be a part of the home.
2. Under such circumstances the father, in order to recover for support furnished the wife, must establish good faith on his part and prove by convincing evidence such misconduct on the part of the husband as would justify the wife in abandoning his home and neglect on his part to make adequate provision for support of his wife.

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Cuyahoga County.

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*W. J. Mahon*, for plaintiff in error.

*E. J. Klenicka*, for defendant in error.

WASHBURN, J.

Heard on error.

In this action in the municipal court, John A. Smith, the father of Mrs. E. B. Hardy, recovered a judgment against his son-in-law, E. B. Hardy, for \$240, for twenty-four weeks' board and lodging, furnished by said father to his daughter, Mrs. Hardy, and her child.

The record discloses that Mr. Hardy and his sister were raised by their aunt, and that before his marriage Mr. Hardy explained to the prospective Mrs. Hardy that he felt under obligations to maintain a home for his sister, that he could not maintain a separate home, and that when they were married Mrs. Hardy fully understood and agreed that the aunt and sister should remain as part of his home.

As might be expected, this arrangement did not prove entirely satisfactory, and, because of the presence in the home of the aunt and sister and the consequent friction caused thereby, rather than because of any serious misconduct of the husband, Mrs. Hardy abandoned the home and went to live with her father.

Later, by arrangement between the husband and wife, the husband paid the wife \$4.00 per week, for a time, which was later increased to \$6.00 per week, and she made no further demand upon him; and he was willing, and she knew he was willing, to support her and their child in the home he provided and maintained.

The father of Mrs. Hardy made no investigation to ascertain whether his daughter was justified in abandoning her home, and did not make known to the husband the fact that he expected to charge him for the board and lodging of his wife until twenty of the twenty-four weeks had elapsed.

The statutes of Ohio, bearing on the questions here involved, are as follows:

"Section 8004. If the wife abandons the husband, he is not

liable for her support until she offers to return, unless she was justified by his misconduct, in abandoning him."

"Section 7996. The husband is the head of the family. He may choose any reasonable place or mode of living and the wife must conform thereto."

"Section 8003. If the husband neglects to make adequate provision for the support of his wife, any other person in good faith, may supply her with necessaries for her support, and recover the reasonable value thereof from the husband."

Under all the circumstances disclosed by the record, we have reached the conclusion that the trial court was manifestly in error in finding that the misconduct of the husband justified the wife in abandoning the home provided by him, so as to make him responsible for the support furnished her by her father.

Where the husband maintains a home for the wife, which is as good as his means will permit, and the wife objects to the presence of others therein, whom, before marriage, she understood and agreed should be a part of such home, and she abandons such home and returns to her father, and her father seeks to hold the husband for her support, the father should be held to a stricter proof than a tradesman or other parties not related to the wife, as to the necessity of harboring and furnishing her with necessities. Under such circumstances public policy demands that the good faith of the father be established, and that he produce convincing proof of the misconduct of the husband, which justified the abandonment of the home, and neglect on the part of the husband to make adequate provision for the support of his wife.

This record does not furnish such proof, and the judgment of the municipal court is therefore reversed, as being manifestly against the weight of the evidence.

PATTERSON and VICKERY, JJ., concur.

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Logan County.

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**TESTAMENTARY PHRASE CREATING A FEE TAIL.**

Court of Appeals for Logan County.

DAVID U. EDWARDS ET AL, V. VERNAL UPTON EDWARDS, BY JOHN E. WEST, GUARDIAN AL LITEM.

Decided, March 18, 1921.

*Wills—Effect of Use of the Words to "his heirs of nearest kin."—What Constitutes a Sufficient Devise in Fee Tail.*

The phrase "to our son David and his heirs of nearest kin," used in a will with nothing else manifesting a different intention, devises an estate in fee tail in the son David.

*Howenstine & Huston, for plaintiffs.*

*West & West, for defendant.*

Hughes, J., Crow and Warden, JJ., concurring.

We are called upon to construe the item in the will of James H. Edwards, deceased, which reads as follows:

"In the name of the Benevolent Father of all, I, James H. Edwards, of county of Logan and State of Ohio, being of lawful age and of sound mind hereby give and bequeath to my beloved wife, Elizabeth A. Edwards, all of my property both personal and real of which I may be seized at my death, to have and to hold to her only proper use during her natural life and whatever may be left from her support and care during her life, last illness and funeral expenses shall go to our sond David U. Edwards and his heirs of nearest kin."

The will in question was executed during the month of June, 1901, at which time his wife Elizabeth was living, as was his son David, who at the time, was married and had one child. The wife Elizabeth died in 1906. The testator died in November 1918, and left surviving him as his only heir, his son David who at that time had three children.

There is nothing in the will nor in the agreed statement of facts to aid the court in interpreting the meaning of the expression used in this item, and we are therefore called upon to construe it as it stands, without any other language or fact given to indicate the intention of the testator.

There are some expressions that have received judicial interpretation and have a fixed meaning under the law of wills.

There can be no doubt, if a testator uses the expression "I give to my son and his heirs," that he devises a fee simply estate to his son.

It is also determined by our Supreme Court in 100 O. S., page 447, that when a testator uses the expression "to my nearest kin," he means thereby that the estate shall pass to those who would inherit under the statute of descent and distribution and in the order and proportion therein provided, had the testator died intestate.

But we find something more in this will. The testator says that his property shall go to his son and his heirs of nearest kin, and has used more than what is commonly known to pass an estate in fee simple. He has given a description to the heirs of his son David to whom his property shall pass upon the death of his son. If he had said "To David and his heirs," or if he had said "David and his nearest kin," we would entertain little doubt but that the intention of the testator was to devise a fee simple in his son.

There is a well known axiom that each word used must be given a meaning, if possible.

We are quite satisfied that by the use of the expression "To David and his heirs," he has passed an estate in fee, under the rule laid down in Second Blackstone, page 115. But when he has added to or qualified the particular heirs that are to succeed, he has placed an entailment upon the fee, and the first devisee becomes a holder in fee tail.

It is said in 10 Ruling Case Law, Section 14, under the title "Estates," "That any expression in a will denoting an intention to give the devisee an estate of inheritance descendable to his, or

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some of his, lineal, but not collateral, heirs, have always been regarded as a sufficient devise of a fee tail."

While the use of the words "nearest" or "next of kin" used alone no doubt means those who would inherit had he died intestate, or in other words, those who would have been his heirs, yet when they are added to the expression "To David and his heirs," it is an expression of limitation establishing a different succession than the law would make under the sole expression "his heirs."

As was said by Justice Read in the 15 Ohio, at page 563:

"The testator may use the word 'heir,' and take it without its usual legal sense, if he employ words respecting it to show that he did not use it in its ordinary legal sense, or if the plain intention manifested in the will shows that it was not employed in its usual legal sense. A mere presumed intention will not control its legal signification and operation; but with words of explanation, showing the manifest intent of the testator, it can be made a word of purchase. If, where the word 'heir' is used, there be superadded words of limitation, establishing a new succession, the first donee or devisee would take but a life estate. The expressed intent then, of the testator, will affix the meaning to the word 'heir'—it is said a mere implication will not."

We are not unmindful of the rule in Ohio, as it is elsewhere generally pronounced, that courts do not lean to or favor entailed estates, yet it is always the duty of the court to give that interpretation to the will which the testator has made manifest as his intention.

We have before us the record in case number 13912, reported in the 90 O. S., page 467, in which the court was called upon to interpret the following item of a will:

"Sixth. This last excepted parcel I give and devise to Ada May Sheffield and to the first child born to her in lawful wedlock, in fee simple on and after January 1, 1902 "

Our Supreme Court in this case gave interpretation to this item to the effect that it created a fee tail estate in Ada May Sheffield, showing clearly a response to this duty aforesaid.

Being of the opinion as here expressed, that the words "of nearest kin," added to the expression "to his heirs," is a word limiting the heirs of succession, we hold that the will in question devised to David U. Edwards, an estate in fee tail.

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**UNAUTHORIZED LEASE MADE BY EXECUTORS.**

Court of Appeals for Muskingum County.

**J. L. SWINGLE ET AL V. H. ELLSWORTH STAKER AND CHARLES E. RUSSELL, AS EXECUTORS OF THE ESTATE OF JOHN STAKER, DECEASED.**

Decided, April 15, 1920.

*Estates of Decedents—Executors Without Authority to Mortgage, Lease, Rent, or in any way Encumber Real Estate Belonging to the Decedent, Unless.*

A contract or lease covering real estate, executed by an executor not authorized so to do by the will of his decedent, is not enforceable.

*C. T. Marshall and H. E. Bunker, for plaintiffs.*

*C. L. Post, C. F. Ribble and E. F. O'Neal, for defendants.*

Houck, J.

This case is here on appeal from the common pleas court of Muskingum county, Ohio, and is submitted to this court on demurrer to the petition and the two supplements thereto.

The question to be determined by this court is: Do the petition and the two supplements thereto state a cause of action?

The allegations and facts stated in said pleadings are well known to counsel and for that reason will not be set out in detail in this opinion.

It is practically conceded by counsel that, if the paper writing upon which the petition is based is a lease, then the executors

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were and are without authority in law to make and enter into such contract contemplated thereby, leasing the real estate of their decedent.

This brings us directly to the question: What is the paper writing now before us and what is its force and effect in law, as applied to the parties hereto?

A careful examination of all the authorities cited by counsel, as well as an examination of some not cited, clearly convince us that in Ohio, the paper writing in question is a lease with all the elements incident thereto.

We think the rule is so well known that it needs no comment here, that an executor has no right to mortgage, lease, rent, or in any way encumber the real estate of his decedent, unless such executor is so authorized and empowered in the will of his decedent.

If the paper writing now before us for construction be properly executed, it in law would be a lease, and even then, no authority having been given the executors of the will of John Staker, deceased, to make such contract or execute a lease on the real estate of which he died seized, it follows that said executors were and are without power or authority in the premises.

We do not think it necessary to discuss any of the other questions raised by counsel in the instant case, because the one already passed upon and determined by this court is decisive of the case so far as the demurrer is concerned.

Thus it follows, and we are unanimous in our conclusion, that the demurrer is well taken and must be sustained.

Demurrer sustained.

Shields, J., and Patterson, J., concur.

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Burns et al v. Crowe.[81 O.C.A.]

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**COMPENTENCY AND WEIGHT OF TESTIMONY OFFERED  
IN A WILL CASE.**

Court of Appeals for Scioto County.

**MARY A. BURNS ET AL v. MARY CROWE.\***

Decided, June 3, 1920.

*Wills—Niemes Case Without Effect—No Change in the Ohio Rule—  
Making Incompetent the Opinion of a Witness as to the Capacity  
of a Decedent to Make a Will—Notwithstanding the Qualifications  
of the Witness to Express such an Opinion.*

1. The opinion of the Supreme Court in the case of *Niemes v. Niemes* in no way modifies or relaxes the rule in Ohio as to the competency of lay testimony in respect to the capacity of a decedent to make the will which he did make, but is confined to criticism of the reasons for establishing such a rule, and error can not be predicated on the refusal of a court to receive the testimony of witnesses expressive of an opinion as to the mental testamentary capacity of the decedent, regardless of the competency of such witnesses to form a trustworthy opinion in that behalf.
2. It is not error for a court to refuse to instruct the jury in a will case that there is no evidence sustaining the claim of undue influence, where evidence has been offered to the effect that a beneficiary under the will obtained the consent of the decedent to the calling of a lawyer to draw the will, and that a lawyer was procured and the will executed, and that two weeks later the same beneficiary applied to the probate court for the appointment of a guardian for the decedent on the ground of imbecility and was subsequently named as one of the guardians appointed by said court.

*Blair n Blair* for plaintiffs in error.*T. S. Hogan, Miller & Searl, and A. T. Holcomb, contra.***MIDDLETON, J.**

This is a proceeding in error to reverse a judgment of the court of common pleas setting aside, by the verdict of a jury, the last will and testament of one John Crowe, deceased.

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\*Motion to require the Court of Appeals to certify its record in this case overruled by the Supreme Court, June 28, 1920.

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The petition in error presents no new or unusual questions. It is contended by the plaintiffs in error that there was prejudicial error in the trial below:

*First*—In the exclusion of evidence offered by them.

*Second*—In refusing to give certain instructions to the jury requested by them.

*Third*—That the verdict is against the manifest weight of the evidence.

The evidence excluded in the trial in respect to which complaint is now made, was the answer of Judge Beatty, who adjudged the testator to be an imbecile, soon after the will was executed, to the following question:

“I will ask you if, in your judgment, from what you saw and learned of John Crowe, he had sufficient mind and memory to make a proper testamentary disposition of his property on the date you saw him?”

And also the withdrawal from the consideration of the jury the last sentence in the answer of Arthur H. Bannon, the attorney who prepared the will and was present when it was signed, to a question regarding the mental condition of the testator at the time he made his will, which answer and question are as follows:

“Q. Now, Mr. Bannon, I will ask you what his mental condition was in your judgment at the time he executed and signed that will on the 15th day of March, 1915?

A. He had a well-balanced mind at the time, and knew what he was doing, and was able to make a will.”

The witness' statement “he was able to make a will” was withdrawn from the jury.

The action of the court in both instances was completely in harmony with the settled rule in this state as announced by our Supreme Court in *Runyan v. Price, et al.*, 15 O. S., 1, and reaffirmed by the same court in the more recent case of *Bahl v. Byal et al.*, 90 O. S., 129, decided March 17, 1914. In the former case it was held in the third syllabus:

"\* \* \* nor can he be asked his opinion as to the capacity of a testator to make a will. Such inquiry involves a matter of law; also assumes that the witness knows the degree of capacity required to perform the act in issue."

And in the latter case in the first syllabus it is said:

"It is not competent, in a proceeding to contest a will, for a witness to give an opinion as to whether the testator had capacity to make a will. But the physical and mental conditions from which it may be determined by the court and jury whether he had such capacity are facts which may be shown by evidence of manifestations of such conditions."

While this court is satisfied that both witnesses involved here are undoubtedly qualified to know, and did know, the degree of capacity required by law to make a valid last will and testament, yet this inquiry in both instances involves the matter which, under the law, is to be determined by the jury, and is therefore within the inhibition named in the rule above quoted that it involves a matter of law. Therefore, the answers of both witnesses were incompetent.

It is contended, however, that the later case of *Nimes v. Nimes et al*, 97 O. S., 145, modifies or relaxes this rule. We have read this case with great care, and while the opinion of the court by Judge Nichols is in very interesting discussion of the subject of the admission of lay testimony in respect to testamentary capacity it does not, in our judgment, decide anything pertinent to our inquiry here, nor does it modify in any degree the rule as established in *Runyan v. Price, supra*. At most, this opinion is a criticism of the reasons for the establishment of the rule which excludes such testimony. We can not, therefore, accept this case as authority for the admission of the testimony of these witnesses.

The next error complained of relates to the refusal of the court to instruct the jury that there was no evidence to sustain the claim of undue influence. We can not discuss in detail this whole record. The testimony of one witness—Andrew Crowe, a brother of the testator and one of the two beneficiaries named in the last will—furnishes, in our judgment, ample reason to sup-

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port the refusal of the court to give this instruction. This witness testified that he procured the attorney who wrote the will. He says this was done at the instance of the testator. This shows that this witness undoubtedly discussed the matter of making a will with the testator before it was made, that he was in a position to talk to the testator before the latter made his will, and that he sustained such a relation to John Crowe that Crowe entrusted him with the duty of procuring a law to write the will. It thus appears that this witness not only had the opportunity to influence the testator, but his further acts and admissions show that he had the disposition to control the testator if he could. It appears that, with the co-operation of others, he later succeeded in isolating John Crowe so that other relatives could not see him, and even refused the attorneys representing such relatives admission to Crowe's presence, and then boasted of it when testifying. His interest in this matter is further shown by the fact that he filed an application charging the testator with imbecility within a short time after this will was made, probably not more than two weeks, and that subsequently he was appointed one of the guardians of the testator. It is argued that all these facts are without probative force as they occurred after the will was made. While it is true they did so occur, yet they were so recent after the making of the will as to furnish strong proof, in our judgment, of this witness' attitude and disposition toward Crowe not only after, but before the will was made, and his evident purpose and intention to prevent testator from controlling his property and disposing of it as he might see fit. Here, at least, was a scintilla of evidence to support the issue of undue influence and required its submission to a jury.

Instruction number eleven might well have been given in the general charge, but the court was not absolutely required to give it, as the jury were fully and carefully charged on that issue in a most excellent exposition of the law, not only upon the question of undue influence but upon the mental capacity required in cases of this character. We can not see upon what theory any prejudice resulted from the court's refusal to give this instruction.

On the claim that the verdict was against the manifest weight of the evidence candor compels us to say that we are not satisfied with this verdict. We are not convinced, by any means, that John Crowe was not competent to make a will, but we can not substitute ourselves for the jury. The appointment of guardians by the probate court of this county very soon after this will was executed, upon the ground that the testator was an imbecile, was undoubtedly the most potent factor in bringing about the verdict in this case. These proceedings were instituted at the instance of the two beneficiaries named in the will, and it was upon their sworn affidavits that John Crowe was an imbecile that they were appointed as his guardians, and all this within a month, or perhaps a day or two longer, of the making of his will. Under such facts we can not say that the record does not present evidence to sustain this verdict, nor that the verdict is clearly wrong. Our position in respect to this claim is aptly stated by the court in *McGatrick v. Wason*, 4 O. S., page 575:

"Should we disturb this finding? If it is clearly wrong we must do so; if we only doubt its correctness we must let it alone. In *French v. Millard*, 2 O. S. R., 53, this court said: 'We are not satisfied that the verdict of the jury was right. But this is not enough. A mere difference of opinion between court and jury does not warrant the former in setting aside the finding of the latter. That would be, in effect, to abolish the institution of juries and substitute the court to try all questions of fact. It must be clear that the jury has erred before a new trial will be granted on the ground that the verdict is against the weight of the evidence.'"

Judgment affirmed.

WALTERS and SAYRE, JJ., concur.

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**EFFECT OF COMPROMISE WITH INDEPENDENT CONTRACTOR  
BY ONE INJURED BY OBSTRUCTION IN STREET.**

Court of Appeals for Cuyahoga County.

**KOUBA v. CITY OF CLEVELAND.**

Decided December 16, 1920.

*Negligence—Woman Stepping from Street Car in Night Time—Falls over Pile of Sand and is Injured—Contractor Primarily Liable and Recovery from Him Bars Action Against the City—Accord and Satisfaction.*

1. Where a person is injured by coming in contact with materials left in a street by an independent contractor in the execution of a contract with the city to repave a street, and such injured person receives compensation from the contractor in complete satisfaction of all claims against such contractor for damages arising from the injury, he can not later recover damages from the city for the same wrong.
2. In such case there is but one wrong and one injury, and there can be but one recovery. The contractor alone is the active wrong doer and the one primarily liable, the city's liability being secondary only.

*Englander & Bowden, for plaintiff in error.**W. B. Woods, director of law, and James Cassidy, for defendant in error.***WASHBURN, J.**

Heard on error.

It appears from the record in this case that the city of Cleveland, desiring to repave one of its streets, entered into a contract with one R. P. Burnett. The contract provided that Burnett should be responsible for all damages occasioned through neglect or failure on his part, or of anyone in his employ; that he should take all necessary precautions to prevent injury to others. He further agreed to place colored lights and proper barricades at all excavations and other dangerous places, in or-

der to prevent accidents. The contract also provided that Burnett should indemnify and save the city harmless from and against all claims, demands, suits, actions, recoveries and judgments of every description brought or recovered against it by reason of any act or omission of said contractor, his agents or employees, in the execution of the work, or in consequence of any negligence or carelessness in guarding the same, or by reason of any insufficient protection.

It further appears that in performing the contract Burnett caused piles of sand, gravel and crushed stone to be placed on a portion of said street at a place where the cars of the Cleveland Railway Company regularly stopped to discharge and take on passengers, and that on September 25, 1918, there were no warning lights or watchmen to advise users of the street of the condition thereof, which is claimed to have been made dangerous for use by reason of said improvement being made; that the plaintiff, Grace Kouba, being a passenger upon a car of the Cleveland Railway Company, alighted from it in the night season, at said crossing, came in contact with the piles of material, was thereby caused to fall and suffer injury.

For the purposes of this opinion, we assume that the circumstances were such that the plaintiff was entitled to recover damages for injuries caused by the negligence of Burnett in failing to properly guard said materials or warn the public in the use of the street.

It further appears from the record that after such injuries, plaintiff, claiming that the railway company was responsible for the same, succeeded in inducing the railway company to pay her \$300, for which she gave the company a covenant not to sue it; that later she claimed that Burnett was also liable to her for said injuries, and, after negotiating with him, for and in consideration of \$125 paid to her by him, entered into a covenant not to sue, in which covenant she recited these same injuries and the manner in which she received them, set forth her claim that Burnett and the city of Cleveland were liable therefor and that Burnett denied liability, and agreed for herself, her heirs, executors, administrators and assigns that she would not institute, maintain

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or prosecute any action against said Burnett to recover damages for said injuries, or for any other matter arising out of same. It was also stated in her said covenant not to sue that she did not receive the \$125 in payment or otherwise for her injuries, but only in consideration of her not suing, and that it was not her intention to release the city of Cleveland from any claim that she had against it for the injuries she had sustained, and that by acceptance of said money she did not intend to waive any rights of any kind or character that she might have against the city of Cleveland, growing out of said action.

Upon being sued, the city of Cleveland set forth in its answer as its second defense the fact that Burnett was a contractor, having the exclusive control over the method and manner and means of doing the work, that he had agreed to save the city harmless from any liability for damages for any injuries sustained by anyone in the use of said street, by reason of the condition in the street created by said contractor while the contract was being performed, and that her injuries were caused solely by reason of conditions created in the street by the contractor in doing the work of grading, draining and paving the street under said contract. The answer also sets forth the fact that plaintiff had presented a claim to the railway company and made settlement with it, and had also made claims against Burnett, the contractor, and, for a consideration received, agreed not to sue him for injuries.

Upon the trial of the case these facts were proven, and the trial court, being of the opinion that plaintiff's settling with Burnett, and for a consideration agreeing not to sue him, released the city from any liability to her for said injuries, arrested the evidence from the jury and rendered judgment in favor of the city.

The matter is now before this court, the claim being that the lower court, in rendering such judgment, committed error, for which the judgment should be reversed.

As we view this matter, assuming that plaintiff was entitled to recover from someone for injuries received by reason of negligence in not properly guarding said improvement and warn-

ing the public in reference to the use of the street, we think that not only by the terms of the contract between the city and Burnett, but by operation of law independent of the agreement to that effect in said contract, Burnett was the party, as between the city and himself, who was primarily liable to respond in damages for her injuries. The city was liable only because the law made it responsible for the negligence of the contractor, but its liability was secondary, and if it had been sued in the first instance, and recovery had against it, it could recover against Burnett, the contractor, the perpetrator of the wrong. *Morris v. Woodburn*, 57 Ohio St., 330, and *Bello v. Cleveland*, post.

We are clearly of the opinion that if she had sued the party primarily responsible for her injuries, and had received satisfaction from such party, she could not then have sued the city and recovered for the same injury. We stated our view of this matter in the case of *Bello v. Clevelanl, supra*, as follows:

"Where there is but one wrong and one injury, there can be but one satisfaction; it would be different if both were active and independent wrongdoers, or if there were concerted action, but where one is by statute simply made liable for the wrongful acts of another, and that other responds in damages for his wrong to the injured party, there can be no further recovery."

In this case, her agreement not to sue the party primarily liable, where that agreement was supported by a valuable consideration, which was received and retained by her, is as complete a satisfaction as would have been a recovery of a judgment against the contractor and the payment of the same by the contractor to her. The city was not an active wrongdoer, either independently or in concert with the contractor; its position, so far as this question is concerned, was in the nature of a surety for the wrongful acts of the contractor. She was charged in law with full knowledge of that situation, and when, with such knowledge and for a valuable consideration, she bound herself not to enforce her claim against the wrongdoer, who was ultimately liable therefor, she ought not, in consonance with good morals and a sound public policy, to be permitted to recover against one whose liability depended upon her right to recover against the wrong doer.

DUNLAP and VICKERY, J.J., concur.

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**UNENFORCIBLE CONTRACT RELATING TO A STEAM  
AND INTERURBAN RAILWAY CROSSING.**

Court of Appeals for Miami County.

**HARMON ET AL., RECEIVERS, V. THE SPRINGFIELD, TROY & PIQUA  
TRACTION CO.**

Decided, June 18, 1918.

*Crossings—Maintenance of—Where in a Street Used by Steam and Interurban Railways—Agreement Rendered Nundum Pactum by Lack of Consideration.*

Since an interurban railroad may, without paying compensation, cross the tracks of a steam railroad located in the center and at the grade of a highway, a contract obligating an interurban railroad to construct and maintain a crossing is *nundum pactum*, where the only consideration for such a contract is the right granted the interurban railroad to cross the tracks of the steam railroad company.

\*Motion to require the Court of Appeals to certify its record in this case overruled by the Supreme Court, November 26, 1918.

*J. E. Bowman*, for plaintiffs in error.

*Broomhall & Broomhall*, for defendant in error.

**FERNEDING, J.**

Heard on error.

The original action was brought by The Springfield, Troy & Piqua Traction Company against The Cincinnati, Hamilton & Dayton Railway Company to recover one-half the cost of the renewal of the crossing on the two railroads on the Springfield and Urbana turnpike road.

All the material facts are stated in the amended petition, and the cause was disposed of in the court of common pleas on a demurrer to the amended petition.

The amended petition contains the averments that the traction line operated, and crossed the steam railroad tracks, in the center

of the highway, and that at the time of the construction of the traction railroad it was agreed between the two companies that the traction company was to construct and maintain the crossing at the intersection of such railroad.

The traction company contends, and the lower court held, that there was no consideration in the original agreement imposing the entire obligation upon the traction company.

Section 3775, General Code, provides:

"When the tracks of two street railroads, or of a street railroad and a steam railroad, cross each other at a convenient grade on a street, the crossing shall be made with crossing-frogs of the most approved pattern and materials, and kept up and in repair at the joint expense of the companies owning such tracks."

In the absence of a valid contract this statute would fix the liability of each of the companies. It was doubtless competent for the parties to vary this liability by agreement based upon a sufficient consideration.

The only supposed consideration contended for is the right of the junior company to cross the tracks of the senior company. Here, however, the crossing was in the center, and in the grade, of the public highway, and we think in such case the junior company has a legal right to cross the tracks of the senior company without compensation.

See *C. & H. Elec. St. Ry. Co. v. C., H. & I. R. Co. et al.* 21 C. C., 391, affirmed, without opinion, 64 Ohio St., 550.

There being, therefore, no consideration for the contract in question, it follows that the contract is *nudum pactum* and of no binding force.

The amended petition in our opinion states a cause of action, and the demurrer thereto was properly overruled.

KUNKLE and ALLREAD, JJ., concur.

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Stark County.

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**ILLEGAL REGULATIONS FOR GOVERNMENT OF BARBER SHOPS.**

Court of Appeals for Stark County.

**OLIE LENHART ET AL v. E. W. HANNA ET AL.**

Decided, September Term, 1920.

*Constitutional Law—Police Power Must be Exercised Within Constitutional Limitations—Ordinance Regulating Barber Shops as a Sanitary Measure—Made Violative of Constitutional Rights by its Drastic Provisions.*

Police powers are not superior to constitutional limitations, and legislative action based on such power is subject to judicial review; and where action thus taken is unreasonable, oppressive, confiscatory and in contravention of the right to carry on an occupation with due regard to law and the health of the community, injunction lies against its enforcement.

*Amerman & Mills*, for plaintiffs.

*C. A. Fisher*, City Solicitor, and *Jas. E. Kinnison*, Assistant Solicitor, contra.

Heard on appeal.

**SHIELDS, J.**

The plaintiffs for themselves and others who are engaged in the business of operating and employed in barber shops in the city of Canton, Ohio, brought suit against the defendants as members of the board of health of said city, including the defendant, J. A. Kappelman, as health officer of said city, to enjoin the defendants from enforcing or attempting to enforce the provisions of a certain resolution passed by the said board of health, November 25, 1919, to be effective January 1, 1920, entitled a resolution "providing certain rules and regulations governing barber shops in the city of Canton," a copy of which resolution is attached to and made a part of the plaintiff's petition, but the same is not here given on account of its length, the

alleged objectionable features, however, appear in this opinion. That said resolution has been duly published and the same will be in force and effect on and after January 1, 1920, unless its operation is restrained by an order of court. After reciting the several provisions of said resolution, the plaintiffs aver that the same "is unreasonable, arbitrary, unjust, and without authority of law, and that it will be impractical and impossible for plaintiffs and others similarly situated in said city to observe all of the capricious rules and regulations provided in said resolution, which are entirely unnecessary in providing sanitary conditions in and about barber shops in said city." That in attempting to conform to the provisions of said resolution, were they able to do so, it would entail an additional expense of from \$10 to \$15 per week upon each and every barber shop in said city, and in addition thereto it would be necessary to employ the service of special servants to carry out the provisions of said resolution, which would be practically ruinous to their business. That the employees in said barber shops have served notice on their employers that they will refuse to apply for a license to work under the terms of said resolution, that they will quit their present places of employment and seek employment elsewhere, where such unreasonable regulations do not obtain, and that by reason thereof the plaintiffs aver that if the provisions of said resolution are enforced, they will be obliged to discontinue their business. They further aver that the defendants have undertaken, arbitrarily and without authority of law, to assess a penalty for the non-observance of all the terms and provisions of said resolution; that in passing said resolution they have discriminated against those engaged in a lawful occupation by imposing unusual and unnecessary restrictions on them by requiring all such to submit to a physical examination and pay a fee therefor, thus creating an illegal and unconstitutional discrimination against such business, which is a practical denial of their rights as citizens and a violation of their rights under the Constitution of the State of Ohio. They further aver that they and others acting with them are without adequate legal means to protect themselves against the enforcement of the

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provisions of said resolution and that if the same is allowed to be enforced, they will suffer loss of their property and business and will be irreparably injured, unless the court in the exercise of its equity powers grants them protection and relief. A temporary restraining order was prayed for and they ask that on final hearing said order may be made permanent.

A general demurrer filed to said petition was overruled. Thereupon the defendants filed an answer to said petition admitting that the plaintiffs are engaged in the business of operating barber shops in said city, that the defendants compose the board of health of said city, that J. A. Kappelman is the health commissioner thereof, that the resolution attached to the plaintiff's petition is a true copy of the resolution adopted by said board of health providing rules and regulations to govern the operation of barber shops in said city, to become effective January 1, 1920, that the same has been duly published and that the plaintiffs and those in their employ have been notified of the provisions of said resolution, and barring the foregoing admissions the defendants deny each and every allegation in said petition.

A temporary restraining order was allowed by the court below as prayed for and on a hearing had said order was by said court made permanent. The case comes to this court on an appeal taken from the judgment of said court.

Several questions arise upon the record but those mainly insisted upon by counsel for the plaintiffs relate to the unreasonable and discriminatory character of the resolution upon which this action is based. While admitting that the board of health of a municipality in the exercise of the powers conferred by statute may make and enforce all reasonable and necessary orders in the interest of public health, and may make such orders and regulations as it deems necessary for the prevention and spread of contagious diseases, all of which is of supreme importance to any community, it is contended on behalf of the plaintiffs that the defendants, in seeking to regulate the business of the plaintiffs by the passage of the resolution in question, have exceeded their authority in law by imposing upon them unreasonable restrictions and burdens with which they can not comply, and

which if enforced against them will result in their discontinuance in said business and practically amount to a confiscation of their property.

That the action of the board of health in passing said resolution was to regulate the business of barber shops in said city by requiring cleanliness to be observed in the places where said business is carried on, and of the persons engaged in said business, is apparent from the reading of said resolution, but are its provisions fair, reasonable, and impartial—reasonable and impartial toward this particular trade or business occupation which is everywhere recognized as both useful and legitimate, as much so as that of the merchant or other persons engaged in commercial business? The plaintiffs make answer in the negative. Without pointing out in detail the objection made to said resolution, they say, among other things, that the provision requiring the proprietors of barber shops in said city to apply for and obtain a permit of the health department of said city upon the payment of an annual fee before being authorized to carry on said business in said city, and the provision requiring a physical examination of all barbers carrying on said business in said city and the payment of a fee therefor as a condition thereof, and the provision requiring barbers while serving customers "to wear a light colored, washable blouse or coat" and "razors used on all customers must not be stropped until after they are sterilized," and other like provisions in said resolution are unreasonable, oppressive, and impracticable, and further, that they are violative of the constitutional rights of those engaged in said business as barbers.

While conceding that their places of business should be kept clean and sanitary, the plaintiffs and others engaged in said business testify that a strict regard for such practice is universally observed by them, and that in the use of tools and instruments used for carrying on their business, a like regard for cleanliness is shown to insure customers immunity from contracting and to prevent the spread of contagious disease when contracted. In this connection we may incidentally refer to the interesting and valuable suggestions made by the members of

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the board of health in their testimony upon this subject. As has been said "the human body is but a reservoir for the accumulation of disease with its activities not limited to country or climate," hence it is that the note of caution is sounded by those best qualified to speak upon communicable diseases that care should be observed by those who congregate in business places, and that sanitary measures should be practiced both in public and in private as a necessary precaution against taking on any of the numberless forms of disease to which the human body is subject. Theoretically the philosophical dissertation of the witnesses of the medical profession on the nature and spread of contagious disease is sound, and in many respects the provisions of said resolution making it necessary to observe sanitation in barber shops are equally sound, but we are still met with the proposition challenged by the plaintiffs, namely, Can the board of health require of the barbers what is termed a license as a condition to carry on their business in said city, to require that they be physically examined before hand and pay a fee therefor, and be compelled to wear a certain prescribed garb while engaged in the service?

We know of no good reason in morals or otherwise why the barber should be compelled to pay special tribute to the health department to enable him to carry on his business, if lawfully conducted, nor do we know how the board of health assumes to take jurisdiction to regulate such business by requiring those engaged in such service to wear a certain prescribed garb. That it has the power to regulate such business by the making and enforcing orders consistent with reasonable rules governing health is not disputed, but its right to enact penal measures as a means of enforcing unreasonable and discriminating legislation against a lawful trade and those engaged in it is disputed, and we think rightfully so, even assuming that all the necessary preliminary steps were taken by the board of health prior to the passage of said resolution, for it is but fair to assume that the power thus given is to be exercised in favor of the existence rather than the destruction of any lawful business. And we also think that every person engaged in a legitimate business has

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the right to prosecute such business in his own way, so long as he does so by complying with the law pertaining to such business and by observing all reasonable rules pertaining to the public health, and such right can not be interfered with or taken from him without due process of law. In the legitimate and peaceable pursuit of this business he is protected by the law and any curtailment of this privilege is an invasion of his constitutional rights. It was said in argument that where a subject is within the police power of the state, the question of regulation rests with legislative action and is not subject to the control of judicial decision, but this pre-supposes legislative action within constitutional limitations and not legislation which clearly discriminates against a particular lawful trade or occupation, and which does not impose unreasonable burdens thereon. In *Froelich v. City of Cleveland*, 99 O. S., at page 376 it was held that:

“The state and municipalities may make all reasonable, necessary, and appropriate provisions to promote the health, morals, peace, and welfare of the community. But neither the state nor a municipality may make any regulations which are unreasonable. The means adopted must be suitable to the end in view, must be impartial in operation and not unduly oppressive upon individuals, and must have a real and substantial relation to their purpose, and must not interfere with private rights beyond the necessities of the situation.”

The same principle was announced in *Toledo Disposal Co. v. State*, 89 O. S., 230; also in *Bernhardt v. Wise*, 12 N. P. (N. S.), in the latter case the rule was announced that

“Under the mere guise of police regulations, personal rights and private property can not be arbitrarily affected, and the determination of the Legislature is not final or conclusive.”

So the discretionary power to be exercised by the Legislature must rest upon reason, for its exercise does not authorize an unlimited control over the business occupations of a people who are carrying on their business with a due regard for the law and its application to the health of the community. And in this connection it seems unnecessary to add that the power to regulate

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does not include the power to confiscate and destroy. Nor are police powers superior to constitutional limitations, and while it is a settled principle of law that where a subject is properly within the police power of a state, the question as to what regulations are proper and needful is one for legislative action, and that discretion in such cases can not be controlled by judicial decision; still where it is exercised in direct conflict with a constitutional provision, such legislative action is not final but is subject to judicial decision, and we think such is the case here.

Without pursuing this subject further we are of the opinion that the provisions of said resolution in the several respects mentioned are unreasonable and oppressive, that the same are in violation of the right guaranteed to every person under the law to pursue his business occupation, lawfully, as he sees fit, that the same are discriminatory in character, and that said resolution is in violation of Section 1, Article 1, of the Constitution of Ohio. A judgment and decree may be entered in favor of the plaintiffs and the temporary injunction heretofore allowed will be made permanent. Exceptions.

HOUCK, J., and PATTERSON, J., concur.

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#### SCHOOL BOY SERIOUSLY INJURED BY EXTRACTION OF TOOTH BY A SCHOOL DENTIST.

Court of Appeals for Hamilton County.

McHENRY v. BOARD OF EDUCATION OF CINCINNATI.

Decided, January 17, 1921.

*Boards of Education—Attention to Teeth of Pupils by Dentist Employed by Board is a Ministerial Duty—Broadening of School Activities Require Change in the Old View of Governmental Functions—Liability of Board for Injury to Pupil by School Dentist.*

A board of education is liable for injury from the wrongful act of a servant in the performance of a purely ministerial act, where the wrongful act was the proximate cause of the injury and without fault on the part of the injured person. *Fowler, Admrx., v. City of Cleveland*, 100 O. S., 158, followed.

*Theodore Horstman*, for plaintiff in error.

*Saul Zielonka*, city solicitor, and *Harry R. Weber*, assistant city solicitor, for defendant in error.

HAMILTON, J.

This action was one of negligence for personal injuries.

It appears from the petition that William McHenry, Jr., a boy 11 years of age, was a pupil in the public schools under the jurisdiction of the board of education of the school district of Cincinnati, Ohio; that he was required by the principal of the school to submit himself for examination and treatment for his teeth to a dentist who was an employee of the defendant, and that without the knowledge of his parents the dentist extracted one of the boy's teeth, and in doing so fractured the jawbone; and that he was negligently treated and as a result suffered from blood poisoning, the removal of his jawbone, the amputation of his left leg, stiffening of the shoulder and other injuries. The petition prayed for damages.

To this petition the defendant filed a demurrer on the ground that the court had no jurisdiction of the subject of the action and that the petition did not state facts which showed a cause of action. The trial court sustained the demurrer and dismissed the petition. Error is now prosecuted to this court.

There is no statutory authority for maintaining such an action. It was formerly stated to be the settled law of the state of Ohio, as well as of the land, that such a body corporate as the defendant herein is not liable for an action in tort unless specifically authorized by the statute, and this rule has been so well settled, and so often thus decided, that the citing of authorities is unnecessary. It appears, however, that our own supreme court, in the recent case of *Fowler v. Cleveland*, 100 Ohio St., 158, departed from this which seemed to be the established law of the land. That case was an action brought against the city of Cleveland by the plaintiff for the wrongful death of Fowler, caused by its fire department's motor hose truck in returning from a fire. The case of *Frederick v. Columbus*, 58 Ohio St., 538 (51 N. E., 35) has been the recognized authority in the state of Ohio for holding

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that such actions can not be maintained without statutory authority. In the *Fowler case* the *Frederick case* is specifically overruled, thereby departing from the settled law with reference to the liability of municipal corporations for tort. The question then is, Does the *Fowler case* apply to other governmental subdivisions of the state? Plaintiff's right to maintain this action must be founded upon the rule pronounced by the court in the *Fowler case*. The principle announced as set forth in the third proposition of the syllabus in the *Fowler case* is:

"But where a wrongful act which has caused injury was done by the servants or agents of a municipality in the performance of a purely ministerial act which was the proximate cause of the injury without fault on the part of the injured person *respondeat superior* applies and the municipality is liable."

It will be noted a distinction is made between acts performed in a governmental capacity and the performance of purely ministerial acts, but there seems to be no well-settled line of demarcation between what constitutes a governmental act and a purely ministerial act. However, that need give no concern in the consideration of this case, for the reason that the act of negligence complained of is clearly within the meaning of a purely ministerial act. The trial court in its decision undertook to make a distinction between the applicability of the rule in the *Fowler case* to municipalities and its applicability to other corporate entities, and this position is also taken by counsel for defendant in error here. However, no authority or reason is announced for that distinction, and it rests on the statement that the *Fowler case* only determines the questions as to municipalities and does not extend to other subdivision corporate entities, the claim being that other subdivisions are but *quasi-corporate* entities. While the holding in the syllabus in the *Fowler case* only applies to municipalities, if we are to consider the reasoning and logic of the decision, as pronounced by Judge Johnson, for the majority of the court, we are led to the conclusion that the court intended the rule to apply generally to subdivisions of the state wherever such subdivision is engaged in governmental or min-

isterial acts. That the board of education is such is clearly shown by Sec. 4749, G. C., which provides:

"The board of education of each school district, organized under the provisions of this title, shall be a body politic and corporate, and, as such, capable of suing and being sued, contracting and being contracted with, acquiring, holding, possessing and disposing of real and personal property, and taking and holding in trust for the use and benefit of such district any grant or devise of land and any donation or bequest of money or other personal property and of exercising such other powers and privileges as are conferred by this title and the laws relating to the public schools of this state."

The opinion of Judge Johnson is largely made up of criticism of the rule which had heretofore existed, and the reasons for the same. The language used is general in its terms. That this is true is shown by the following excerpts from the opinion (pages 163 and 164) :

"The power to determine whether certain steps shall be taken in the interest of the public welfare is governmental, and the exercise and expression of the discretion as to the kind of steps and the extent of them is governmental. \* \* \* It was a favorite maxim of the early times in this country that that government is best which governs least, and the authority of the federal government to make internal improvements was long contested. It was the natural expression of protest against the ancient idea that the sovereign was the active and all-pervading influence, and that the duty of the people was to exalt the sovereignty.

"Now, the activities and undertakings of a municipal corporation are manifold. They reach and touch in countless directions. It seems to be utterly unreasonable that all these activities and enterprises which are brought closely home to the lives of all of the people of the municipality must still be regarded as bound up in the vague and uncertain sphere of what is called a governmental function."

It will be noted that these remarks were made in discussing the distinction between governmental and ministerial functions, but there is nothing in the opinion in the way of discussion as to whether a municipality might be liable under such circumstances,

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and another subdivision of the state, having like duties by way of governmental or ministerial functions to perform, might not. That the court did not intend to limit the rule laid down in this case to municipalities is further shown by reference to the fact that the general assembly of Ohio has by statute created a liability against a county in favor of persons injured by mob violence . While this refers to statutory authority on maintaining an action, it shows that the court was not limiting itself in its pronouncement of the new rule to municipalities. Judge Wanamaker in a concurring opinion goes further than the majority opinion and sweeps aside the question of class or subdivision or functions of a subdivision, and puts himself on the broad ground of the right of every person under the constitution for an injury done him in his land, goods, person or reputation to have remedy by due course of law.

The board of education as defined by the statute is "a body politic and corporate, and, as such, capable of suing and being sued, contracting and being contracted with," etc. Its duties are governmental and ministerial. It has the power to determine whether certain steps shall be taken in the interest of the public welfare in educational matters, and the exercise and expression of the discretion as to the kind of steps and the extent of them, all of which is governmental.

It may well be claimed that formerly the action of school boards was governmental only. Now the activities, undertakings of the board of education in carrying out the modern thought of education and development of the physical, as well as of the mental side of the pupil, are manifold. They reach and touch in countless directions. The health of the child is considered as important as the mental development. Medical examination is had in order to classify pupils. Music, art, domestic science, athletics and calisthenics all have been added. It seems unreasonable that all these activities and enterprises, "which are brought so closely home to the lives of the people of the school district, must still be regarded as bound up in the uncertain sphere of what is called a governmental function." In reason and in logic the rule in the case of *Fowler v. Cleveland, supra*,

applies to boards of education, and, is, therefore, controlling in this case. Until the Supreme Court limits the application of the principle this court should follow the rule enunciated by it.

The court erred in sustaining the demurrer to the petition and the judgment will be reversed.

SHOHL and CUSHING, JJ., concur.

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#### LIABILITY OF HUSBAND FOR SUPPORT OF WIFE WHO HAS ABANDONED THEIR HOME.

Court of Appeals for Miami County.

EUGENE SHILLING v THE STATE OF OHIO.

Decided December 30, 1920.

*Husband and Wife—Malicious Destruction by Husband of Property Belonging to Wife.*

The conviction of a husband for malicious destruction of property belonging to his wife may be sustained where it appears that the husband and wife at the time of the alleged offense had separated or were in the act of separating. *State v. Phillips*, 85 O. S., 317, distinguished.

*Alva W. DeWeese*, for plaintiff in error.

*R. A. Kerr*, Prosecuting Attorney, for defendant in error.

ALLREAD, J.

The plaintiff in error was indicted and convicted for malicious destruction of property, not his own, under Section 12477, G. C.

The indictment conforms to the statute. By the evidence, it appears that the property alleged to have been injured or destroyed was that of the wife of the accused. It also appears that the accused and his wife had separated or were in the act of separating; that the accused had returned to the former residence

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of himself and wife, where his wife still resided, to obtain his own goods and while there injured and destroyed certain household goods and paraphernalia claimed to have been the separate property of the wife.

Upon the evidence as to the wife's ownership the trial court charged in substance that if the property described in the indictment or part thereof, although purchased by the husband was given to the wife with the intention on his part that it should be her property, and such facts were proven beyond a reasonable doubt, then such property or such part thereof should be considered the property of the wife within the meaning of the indictment.

Motions for an instructed verdict of acquittal were made and overruled. Exceptions were taken to such rulings and to the charge of the court. The plaintiff in error was found guilty as to a portion of the property described in the indictment. Motion for a new trial was overruled and the plaintiff in error was sentenced. A petition in error has been filed to review such judgment and sentence.

Counsel for the plaintiff in error relies upon *State v. Phillips*, 85 O. S., 317, and counsel for the state relies upon the case of *Pratt v. State*, 35 O. S., 514.

The opinion of Judge McIlvaine in *Pratt v. State*, sustains the charge of the court in the case at bar as to the validity of a gift to the wife, but the question of the guilt of the husband or wife under the general criminal statute for an offense affecting the property of the other was not involved in that case.

The *Phillips* case is more directly in point. It was there held:

"The common law rule that neither husband nor wife can be prosecuted for larceny of the goods of the other, is not abrogated by Sections 7995 to 8004 General Code, defining the rights and liabilities of husband and wife nor by Section 12447, General Code, defining larceny. An intention of the Legislature to abolish an established rule of the common law, and to create a crime where none existed before, must clearly and unmistakably appear."

In *Hutchison v. State*, 8 C.C.(N.S.), 313, the conviction of a

husband, upon a charge of arson for the burning off a building owned by the wife, was sustained and motion for leave to file petition in error in the Supreme Court was overruled. It does not appear that the question of the community of property between the husband and the wife was presented or considered in that case.

The Phillips case stands as the law of this state and it only remains for this court to consider whether the case at bar falls within the rule of the Phillips case or is distinguishable. The Phillips case is founded upon the unity of husband and wife and the community of goods involved in such relationship. Judge Davis carefully states:

"The case is easily distinguishable from many of the cases cited in argument, in which there appear schemes of fraud or violence of which marriage is a part or to which it is an incident, or in which the wife of a husband goes away from the other with adulterous intent, the paramour assisting in the asportation and use of the goods of the defrauded spouse, or in which a third person, without adulterous intercourse or intent, assisted in appropriating and using the goods which were charged to have been stolen; because none of these elements are found in this record."

We think that the opinion in the above case shows that it was intended to limit the decision to the facts of that case, and upon full consideration we are of opinion that the decisions should not be extended beyond the case necessarily decided. The reasons for adhering to the common law rule in the Phillips case are thus stated in the concluding paragraph:

"Moreover, the unity of husband and wife, as recognized in the common law, is founded not merely on a community of goods, but upon the recognized obligation of both to the family and to society. The unit of society is not the individual but the family; and whatever tends to undermine the family, by the irrepealable laws of nature will crumble and destroy the foundations of society and the state. So that the peace and sanctity of the home and family are the ultimate reason for the common law rule."

In the Phillips case the husband and wife were living together at the time the alleged offense was committed. The family rela-

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tion, therefore, existed in fact. The court merely upheld the common law doctrine as applied to an existing relationship.

In the case at bar the husband and wife had separated or were in the act of separating. The family unity was broken up and the property was being divided.

In the case of *Snyder v. People*, 26 Michigan, 106, cited with approval in the Phillips case, Judge Cooley while upholding the common law doctrine of community of property in a case of arson makes the following notable distinction:

"But, in so holding we do not decide that if the family relation is broken up in fact, and the husband and wife are living apart from each other, whether, under articles of separation or not the same exemption from the criminal liability can exist. There is much reason for holding that the dwelling house can be considered that of the husband only while he makes it such in fact, and that there is no such legal identity as can preclude her husband from being considered, in legal proceedings against him, as the dwelling of another when it is no longer his abode."

The cases of *State v. Wincroft*, 76 N. C., 38, and *State v. Matthews*, 76 N. C., 42, also cited in the opinion in the Phillips case are expressly based upon the fact that the husband and wife were living together at the time the offense was committed.

The case of *Kopczynski v. State*, 137 Wis., is an arson case but directly involves the effect upon community property, when the husband and wife are living apart. The decision expressly approves the opinion of Judge Cooley in the Snyder case and elaborates upon the exception above quoted. The syllabus is as follows:

"Neither husband nor wife can be guilty of arson in burning the dwelling house which they jointly occupy as a home regardless of the status of the title; but, it is otherwise where the house is the habitation of one, the other having left it to reside elsewhere, although the marital relations still exist."

In the opinion after stating that the common law rule of community of property does not apply after a separation it is stated:

"There is no prejudicial authority to the contrary brought to our attention or which we have been able to discover, nor any

reason harmonizing with the logic of the common law rule as applied to the concurrence of facts to which only it relates."

Upon a full consideration of the authorities and the reasons underlying the decisions we can not escape the conclusion that where the husband and wife have separated or are in the act of separating, one can not claim the benefit of the common law doctrine of community of goods to defeat a charge of malicious destruction of the property of the other.

The learned trial judge held that the doctrine of the Phillips case should not be applied because the offense here was not adopted from the common law. This position is not without some force but we express no opinion upon that proposition. The phase which we have discussed is in our judgment decisive.

A marked advance has been made in the emancipation of married women in the last half century. The right to hold and control property is now fully recognized in this state. The Married Women's Act also provides for a separation and the division of property. The act of the husband as shown by the verdict was of a malicious and unjustifiable character. It would seem shocking and also incredible that in the year of 1920 such an offense should go unpunished. From a consideration of the entire record we find no prejudicial error and the judgment is therefore, affirmed.

FERNEDING and KUNKLE, JJ., concur.

**OWNERSHIP OF LANDLORD'S SHARE OF CROP GROWING  
ON LAND CONVEYED.**

Court of Appeals for Scioto County.

L. D. CRABTREE v. NAT SMITH.

Decided, April 18, 1919.

*Crops—Share Going to Owner of the Land Treated as Rent—Deed to the Land Conveying All Issues and Profits Covers Owner's Share of the Crop—Oral Agreement to the Contrary Not Admissible.*

1. When real estate is leased for a consideration consisting of a part of the crops raised thereon, the owner's share of such crops is rent for said land and such crops are also the issues of the land for the year in which they are raised and harvested.
2. A deed which conveys certain lands described therein "together with all the privileges and appurtenances to the same belonging and all the rents, issues, and profits thereof" passes to the grantee all the grantor's rights and interests in and to all crops then growing on said lands. Evidence of a parol reservation by the grantor of his interest in such crops when the deed was executed is not competent to modify or contradict the express terms of the grant aforesaid.

*A. Z. Blair, contra.*

*B. F. Kimble, for plaintiff in error.*

MIDDLETON, J.

On the 5th day of August, A. D. 1918, the defendant in error, Nat Smith, and his wife, Annie Smith, conveyed to the plaintiff in error, L. D. Crabtree, by deed of general warranty, a certain farm situate in this county, "together with all the privileges and appurtenances to the same belonging and all the rents, issues and profits thereof."

Growing on the farm at the time of this conveyance was a crop of corn which had been planted and cultivated by one Darez McCain, who was in possession of this farm and continued in possession thereof until after the corn crop was harvested in the

fall and who, under his contract with the owner Smith, was entitled to two-thirds of said crop divided in shock, the remaining one-third being Smith's share as his rent, or at least a part of his rent for the premises. It appears from the record that when the crop matured both Smith and Crabtree claimed the owner's or landlord's share, which controversy resulted in this litigation. Smith claimed the corn by reason of a parol reservation made at the time the deed was executed, and which he was permitted in the lower court to establish by oral evidence. Crabtree not only denied such parol agreement, but insisted that evidence of the same was inadmissible as under the express term of the grant made in the deed this corn passed to him. The lower court found in Smith's favor, and if the evidence was properly admitted by which the parol reservation claimed by him was shown we would not be inclined to interfere with the judgment, as the evidence clearly sustains his contention.

The single question, therefore, before us is whether or not the admission of this evidence contravened the general rule against the admission of oral testimony to contradict, modify or vary the terms of a written contract.

We do not question the proposition that in this state at least growing crops may be reserved by a parol agreement from the operation of a deed for the real estate on which they are growing, notwithstanding the further fact that such crops will pass with a grant of the land as a part thereof in the absence of such reservation. This principle was established by the case of *Baker v. Jordan*, 3 O. S., 438, and rests primarily upon the theory that such crops are regarded generally as personal property and if the parties to a deed treat such crops as personalty and contract by oral agreement accordingly, evidence of such agreement does not contradict the deed but is consistent therewith. Manifestly this rule may not apply where the deed by its express terms treats such crops as a part of the realty, and plainly and by language subject to no doubt passes them with the realty to the vendee. The deed considered by the court in *Baker v. Jordan, supra*, may be found recorded in Vol. 51, at page 228, of the deed records of Ross county, and grants and conveys only real

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estate, which the grantee is to have and to hold with its appurtenances. No reference whatever is made in that deed to the "rents, issues and profits" of the land and there is no grant of the same, with the real estate, as in the instant case. Can we, therefore, give full effect to this deed, as the court did to the deed in *Baker v. Jordan*, and regard it as conveying only the real estate and not including the corn crop in question? We think not. This corn, or the share in controversy, was rent for the use of the land. While rent is ordinarily payable in money, and in a technical sense the right to receive it may be considered an interest in the realty, yet it is the common understanding in this section and everywhere that, in the case of a cropper that portion of the crop he gives for the use of the land is considered as rent. *Lamberton v. Stouffer*, 55 Pa. St., 284. In this case it is said that,

"The *reditus* or rent of a cropper being a portion of the crop, falls due and is payable only when the crop is harvested. This is the universal understanding."

Further, it is held in that case that,

"Grain sown in one year and harvested in the next is the issues and profits of the year in which it is harvested."

Attention is directed to the case of *Bruce v. Thompson* 26 Vt., 741, in which it is claimed a different interpretation is given to the terms "rents, issues and profits," but it is clear that the court in that case did not consider these terms under the circumstances presented here, but only in the sense in which they were used in a statute. Moreover, in that case it is said:

"Rents, issues and profits and such as are of the nature of rent, which is as everyone understands a *reditus* or return by some one holding the land of another for which he owes such return."

There is no difficulty in bringing the subject of this suit within the scope and meaning of "rent" as defined by that court.

Smith's share of the corn was at least a part of the issues of the farm in 1918, and also rent which was accruing at the time

the deed was executed, although not due and payable until cut and in shock.

Upon what theory then may it be excluded from the terms "rents, issues and profits" as employed in the deed? The grant was present, as well as future. It passed all of Smith's immediate rights and there is nothing in the language used by which it could be limited in its operation to the "rents, issues and profits" of some other and future year.

The effect of a grant of "rents, issues and profits" in a deed was before the court in *Wilhoit v Balmon et al*, 80 Pac., 705 (146 Cal., . . .). In that case one Jane Salmon executed a deed in escrow to be delivered at her death, but reserving in the deed a life estate in the lands conveyed. At her death the land was held by another under a contract for grain rent, and a dispute arose between her personal representatives and the grantees in the deed as to the disposition of the crops growing at her decease. In discussing the operation and force of the grant of all the rents, issues and profits aforesaid the court say:

"When Jane Salmon made her conveyance to the appellants, it was for her to determine the extent for which she should transfer her property to them. \* \* \* If she saw fit by the terms of her deed to cut off the common law incidents of a life estate—the right to emblements—by words clearly having that effect and operation, that was her right. And this is what, by the express terms of her deed, she did. To the fullest extent possible, she conveyed to her grantees all her interest in the land, 'together with the rents, issues and profits thereof.' She divested herself of all existing and future rights in the property, except solely the right to retain the use and occupancy of the premises, and take and receive the rents and profits during her life time. \* \*

\* \* \* In her grant to them the language was broad and comprehensive enough to deprive her of all common law incidents of a life estate, and we see no room for contention that it did not. The clause in her deed granting to appellants the premises, with the 'rents, issues and profits thereof,' is entirely incompatible with any construction which would support the contention of respondent that the right to the 'rents' of the premises was reserved to the grantor as a common law incident to her life estate. To so hold would be to render such clause meaningless and inoperative. It would be idle to suggest that by it the grantor

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intended to convey only such crops to her grantees as the latter might sow after obtaining possession on her death. They would take those by virtue of their ownership of the land, and independent of any such provision in the deed. They could, however, only take the crops which were sown by her while life tenant, or to which she would be entitled, by virtue of such clause in their deed, and it was undoubtedly the intention of the grantor to effect that purpose—the only one which the provision would be pertinent to accomplish, and which we think it did."

If the grant of "all the rents, issues and profits" made by Smith in his deed is to be regarded at all and given any meaning whatever, it disposed of all his interest in the growing crop of corn and passed it to the grantee, Crabtree. Any parol agreement to the contrary was and is not consistent with the deed, and testimony by which such agreement is sought to be established is not admissible. This conclusion may not be in harmony with the intention of the parties to the actual contract as understood by both the grantor and grantee, but this is not an action in equity to reform a deed and the court will look only to its plain provisions to ascertain the intention of the parties. *Stove Co. v. Ry. Co.*, 23 C. C. (N.S.), 260.

Judgment reversed and case remanded for a new trial.

WALTERS, J., and SAYRE, J., concur.

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#### LIMITATIONS AS TO THE NUMBER OF WITNESSES HEARD.

Court of Appeals for Cuyahoga County.

[Judges Kinkade, Richardson and Chittenden, of the Sixth District, sitting by designation.]

BORSCHIEWSKI V. STATE OF OHIO.

BORSCHIEWSKI V. CITY OF CLEVELAND.

Decided, March 6, 1920.

A trial court may fix a reasonable limitation on the number of witnesses to be examined on a given issue, and its action in that respect will not be reversed unless the record shows the abuse of sound judicial discretion.

*Henry DuLaurence*, for plaintiff in error.

*Samuel Doerfler*, prosecuting attorney, for defendants in error.

Heard on error.

RICHARDS, J.

Walter Borschewski was tried in the municipal court of Cleveland for two offenses, each alleged to have been committed on May 1, 1919, one charge being for assault and battery, in which he was prosecuted by the state, and the other for committing a disturbance and breach of the peace, in which he was prosecuted by the city for the violation of an ordinance. A jury was waived and he was convicted and sentenced upon each charge. These proceedings in error are brought to secure a reversal of the judgments so entered in the municipal court, and, as the evidence submitted and the points raised in each case are the same, the cases may be disposed of conveniently in one opinion.

The evidence introduced on behalf of the prosecution tends to show that on May Day, 1919, Borschewski was marching in a procession down Superior street, approaching the Square in the City of Cleveland; that this procession was headed by musicians and that Borschewski was carrying a red flag, and that when the procession reached a point between the Hollenden Hotel and the Colonial Theater a controversy arose between certain citizens and Borschewski over his carrying a red flag in the parade. In this melee, according to the testimony of witnesses called by the prosecution, Borschewski was guilty not only of creating a disturbance but of assault and battery. The facts, however, as so testified to by witnesses called by the prosecution, are denied by witnesses called on behalf of the defendant. The testimony offered in his behalf tends to show that he was not carrying a red flag, but a United States flag, and that he did not commit any disturbance or breach of the peace. Much of the testimony offered by the defendant was negative in character, and would not, under the well-known rules for weighing evidence, be entitled to as much credence, other things being equal, as affirmative evidence. In view of the sharp con-

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flict in the evidence we are not able to say that the conviction and sentence in the municipal court were not sustained by sufficient evidence or are contrary to the weight of the evidence. If the defendant was as he claims, carrying an American flag, it is difficult to see how any affray would have been precipitated, and the identity of the defendant was clearly established, if the court believed the witnesses for plaintiff, as it was justified in doing. The trial judge met the witnesses face to face and heard their testimony, and was much better able to determine as to the weight to be given to that testimony than is a reviewing court which only finds the testimony in a written record. *Breese v. State*, 12 Ohio St., 146.

Counsel for plaintiff in error insists that the municipal court erred in excluding cumulative testimony offered by the defendant on the trial. Three witnesses had been called by the prosecution, who testified directly to the unlawful acts charged against Borschewski. Thereupon the prosecution rested. The defendant in his own behalf called and examined four witnesses, whereupon the trial judge said to counsel for the defendant that he could call one more witness, if it was cumulative evidence, to which ruling the defendant objected and excepted. Counsel did thereupon call as a witness John Sitzko, whose testimony was cumulative, and at the conclusion of the testimony of the witness Sitzko, counsel for the defendant stated that the court having ruled before the last witness took the stand that he would hear only one more witness, if the testimony was cumulative, he wanted the record to show that the others were important witnesses. No other or further offer to prove was made, nor any further statement made as to the nature of the testimony that was desired to be offered, nor the number of witnesses that the defendant wished to call, nor who they were. The defendant, himself, however, thereupon took the stand and testified generally in his own behalf. It does not appear to this court that counsel for defendant sufficiently saved the question which he desired to make as to the refusal of the court to receive further cumulative evidence, in view of the fact that the record contains no statement of what counsel

wished to establish, or the nature of the testimony he wished to introduce, other than that it was cumulative, and, in the opinion of counsel, important. The record does not affirmatively show prejudicial error.

We have, however, examined the authorities bearing on the right of a trial court to limit the number of witnesses on the ground that the testimony sought to be introduced is cumulative. Certainly a trial court has no authority to unreasonably restrict the right of a party to offer additional testimony, even though the same may be cumulative. The great weight of authority establishes the principle that if a trial court limits the number of witnesses that may be used to establish a given point or issue in a case, it must be in the exercise of a sound judicial discretion, and the limitation must be reasonable under all the circumstances of the particular case. Such was the decision of the circuit court in *Hupp v. Boring*, 4 Circ. Dec., 560; 8 C. C., 256, which judgment was affirmed by the supreme court, without opinion, in 55 Ohio St., 635.

In the case of *Bird et al v. Young*, 56 Ohio St., 210, Spear, J., in the course of the opinion, on page 223, in discussing an order limiting the number of witnesses as to the mental condition of the deceased to six on each side, and refusing to listen to further cumulative testimony, says:

"Ordinarily, the matter is within the discretion of the trial court, and it does not appear affirmatively that the court abused its discretion in this ruling."

The record in the case at bar fails to show any abuse of discretion in the trial court in limiting the number of witnesses offered by the defense. It was a case in which in all likelihood a great number of witnesses could have been called to establish the guilt or innocence of the defendant, as the occurrence was on one of the principal streets of the city, near to the Public Square, and practically in the midst of a large concourse of people. We can not concede that as a matter of right the defendant could continue indefinitely to call and examine witnesses on such a simple case as one involving a charge of assault and battery or disturbance. If no limitation could be

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imposed by the trial court, then, in a case of this character, so many witnesses could be called as to prevent, in effect, the administration of justice, for it must be presumed that in the municipal courts of a city the size of Cleveland many other cases are awaiting disposition and it is because of practical necessity that a reasonable discretion is imposed in the trial court in the limitation of witnesses, a discretion, of course, which must not be arbitrarily nor unreasonably exercised.

Finding no prejudicial error, the judgment in each case will be affirmed.

KINKADE and CHITTENDEN, JJ., concur.

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#### RIGHT TO A PENSION OF A TEACHER WHO FAILS OF RE-EMPLOYMENT.

Court of Appeals for Muskingum County.

BOARD OF TRUSTEES OF THE SCHOOL TEACHERS PENSION FUND OF  
THE CITY OF ZANESVILLE v. STATE OF OHIO EX REL.  
W. C. BOWERS.\*

Decided, May 22, 1919.

*Schools—Refusal to Re-Employ a Teacher Constitutes Retirement—  
Eligibility of a Teacher for a Pension—Public Schools Defined.*

1. It is not necessary that a petitioner should affirmatively state that he has been a teacher in the public "day" schools of Ohio for the requisite time of twenty years in order to entitle him to a pension as a teacher in the public schools.
2. Eligibility of a teacher for receiving a pension is fixed by the statute at twenty years teaching experience, without regard to the place where the teaching was done.
3. The provision of the statute that the refusal of a board of education to re-employ a teacher "shall be deemed his retiring," and such teacher shall thereupon become entitled to a pension under the provisions of the act, gives him the right to a pension, notwithstanding the board of education may not have intended to retire him by their refusal to re-employ him.

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\* Judgment affirmed by the Supreme Court, May 11, 1920.

*C. T. Marshall and A. A. Frazier*, for plaintiff in error.  
*E. F. O'Neal*, contra.

In mandamus.

HOUCK, J.

The defendant in error here was the plaintiff in the court below.

The petition stated that W. C. Bowers, the plaintiff, had taught school in the public schools of Ohio for thirty-five full years; that he served as superintendent of the public schools of the city of Zanesville, Ohio, from January, 1910, to August 31, 1917, on which last named date his contract for such employment expired; that he was an applicant for re-employment as such superintendent, and was then and is now willing to continue in the service of the board of education of said school district. That he was not re-employed as such superintendent, and that said board of education failed to re-employ him in said capacity or any other capacity whatsoever. That he contributed to the school teachers' pension fund of said school district, that had been duly created by said board of education, in January, 1914, in accordance with the provisions of Title 5, Chapter 9, of the General Code of Ohio, and that such fund is under the control of the defendant.

That all his contributions to said pension fund were made under the provisions of said General Code, and that he in all respects fully complied with same.

That upon the failure of said board of education to re-employ him he demanded of said defendant the allowance and payment to him of a pension as provided in said Chapter 9, Title 5, G. C., of Ohio.

Plaintiff says that he is not able to pay into said fund the full amount of the difference between the sums he contributed to said fund and \$600, as provided in Section 7884, General Code, of Ohio, and requested the defendant to withhold 20 per cent of each monthly payment until the full amount of \$600 had been paid by him, contributed to said fund.

Wherefore, plaintiff prays that a writ of mandamus issue, com-

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pelling the defendant to pay him out of said pension fund, at the rate of \$437.75 annually, during the remainder of his natural life, payable \$43.75 each of the ten months of said school year, less 20 per cent. each month until such time as said 20 per cent. of said monthly payments and the sums heretofore contributed by plaintiff, shall aggregate the sum of \$600.

The defendant below, the plaintiff in error here, filed an amended answer, in which all of the material allegations are admitted, and as an affirmative defense says:

"The board of education by refusing to re-employ the plaintiff as the superintendent of said school after August 31, 1917, did not purpose or intend to retire the plaintiff or to place the plaintiff upon the pension list of said school district of Zanesville, Ohio, but that on the contrary said board of education refused to continue said employment because said board of education, in good faith, believed that said plaintiff was not sufficiently progressive or competent to discharge the duties of said employment, and said board of education, in good faith, intended and purposed to employ a competent and progressive man as superintendent of said schools; that plaintiff is not under any physical or mental disability and is capable of many years of faithful service as teacher in a satisfactory manner, and the said plaintiff is not, therefore, entitled to be pensioned under the provisions of the General Code of Ohio."

To the amended answer a general demurrer was filed and sustained by the trial court. The defendant not wishing to plead further, a judgment in favor of the relator was entered.

The plaintiff in error seeks a reversal of said judgment for the following reasons:

First. That the petition is not sufficient in law, for the reason that there is no allegation that plaintiff was a teacher in the public "day" schools of Ohio.

Second. That the allegations of fact in the petition are not sufficient in law to authorize a court to grant the relief prayed for.

Third. That the affirmative defense set out in the amended answer is a good defense in fact and law.

Is it necessary, in law, that the petition should affirmatively

state that the plaintiff had been a teacher in the public "day" schools of Ohio in order to be entitled to a pension as a teacher in the public schools?

A public school is defined as:

"A school that derives its support entirely or in part from moneys raised by a general state, county, or district tax."

We think the term "public school," as generally accepted, is one which is supported and sustained in whole or in part by public taxation and which is regulated by statutory law; that by common use it refers to and at least includes what are known and designated as "day" schools; and although the statute may be silent as to whether it is a "day" or a "night" school, yet we are satisfied the legislative intent was and is that the expression "public school" should and does include "day" schools.

It is clear to us that any other construction would be meaningless.

The interpretation and construction sought to be fastened upon the words "public school," by counsel for plaintiff in error, appear to us to be too narrow and technical and thus not tenable. When we refer to a public school teacher, it is by common consent and general approval that we have in mind that such person is connected with the "day" schools.

As a general rule, the words of a statute are to be taken in their ordinary and popular sense, unless it plainly appears from the context or otherwise that they were to be used in a different sense.

If we apply this rule of construction, in the present case, we must find the claim of learned counsel for plaintiff in error not well founded.

This leads us to the second alleged error; Are the allegations of fact, in the petition, sufficient in law?

The relator plants his rights in the premises upon the last paragraph of Section 7891, G. C. of Ohio, which reads:

"But if any teacher who has taught for a period aggregating twenty years is not re-employed by the board of education, such failure to re-employ shall be deemed his retiring, and such teacher

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shall be entitled to a pension according to the provisions of this act."

An examination of the allegations of the petition, and in fact the conceded facts in the case, clearly show that the relator has done everything necessary to obtain a teacher's pension. His right to such depends upon the establishment of such a fund. This was done. His contribution to the same as provided by law he has fully complied with, as well as all other things required of him. It was necessary that all of them be done in order that he bring himself within the provisions of the pension act. This being done he is entitled to its benefits.

We hold that Section 7891, G. C., designates two ways of refunding to teachers money paid by them into the pension fund; also provides one way in which a teacher becomes entitled to a pension.

In order to be entitled to a pension he must have taught twenty years. We find no limitations or exceptions placed upon said language; and it must be conceded that, if we give to it its ordinary import and construction, said period of teaching does not refer to the district in which the pension fund has been established. It means just what the words and language upon their face convey to the reader thereof, namely: twenty years teaching experience, somewhere, and some place.

The next requirement is, that he must not be re-employed by the board of education. Then the language of the statute is:

"Such failure to re-employ shall be deemed his retiring, and such teacher shall be entitled to a pension according to the provisions of this act."

There is nothing indefinite and uncertain about this statute; but it is clear, plain and unambiguous.

It was the duty of the board of education to ascertain, if it desired to know, the teaching experience of the relator, prior to its employing him. But it was bound to know the law and as a matter of fact it is immaterial as to whether it knew the length of time its employee had taught prior to his contract of service with said board of education.

The relator had done everything required of him under the pension law. The board of education refused to re-employ him, and by a provision of the statutory law of Ohio, this act on the part of the board of education retired said relator and he thereby was entitled to a pension.

As to the third alleged error. Were the pleaded facts of the amended answer sufficient in law? This is answered in the negative.

To us the amended answer savors of "a plea of confession and avoidance." The defendant below, to avoid liability in the premises, says:

"That the board of education in refusing to re-employ relator did not purpose or intend to retire said W. C. Bowers or to place him on the pension list."

The law fixes the intent of the board of education by its acts, and it can not escape its legal liability in the premises by a failure to know the law.

The answer further says:

"The board of education refused to continue said employment because said board of education, in good faith, believed that said plaintiff was not sufficiently progressive or competent to hold the position, and it intended to employ a competent person," etc.

We are wholly unable to see how the good or bad intention of a board of education can change the provisions of the last paragraph of Section 7891, G. C. of Ohio.

A board of education can neither add to nor take from the plain provisions of the pension act now under consideration; and its intentions can not set aside the requirements of statutory law.

We deem it unnecessary to further review the facts and the law in this case. The record presents no prejudicial error. The court below found the facts and the law in favor of the relator, and it is the unanimous opinion of this court that the trial judge was right in allowing the writ of mandamus to issue and in granting all the relief prayed for in the petition. The judgment of the common pleas court is affirmed.

SHIELDS, J., and PATTERSON, J., concur.

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1921.]Hamilton County.

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**EFFECT ON DEFEATED PARTY OF HIS MOTION FOR A  
DIRECTED VERDICT.**

Court of Appeals for Hamilton County.

NEAD v. HERSHMAN.

Decided, 1920.

*Motion for Directed Verdict—Submitted by Both Parties—Too Late for Defeated Party to Withdraw Motion after Adverse Decision Thereon.*

After both plaintiff and defendant have moved the court for an instructed verdict in their favor and the court has granted the motion in favor of one of the parties, it is too late for the other party to withdraw his motion and have the case submitted to the jury.

*James G. Stewart and Harry Shafer, for plaintiff in error.  
Moses Ruskin and Charles S. Bell, for defendant in error.*

Heard on error.

BY THE COURT.

The defendant in error brought an action for money against the plaintiff in error in the court of common pleas. The suit grew out of a written contract between the parties, whereby Hershman agreed to sell three pieces of encumbered real estate to Nead, and Nead agreed to sell to Hershman a certain piece of real estate, also encumbered. Nead performed his agreement by giving Hershman a deed.

At the trial there was a conflict of testimony as to whether Nead had performed his part of the agreement or not. Nead tendered a certain deed, but there was a dispute as to whether or not Hershman had accepted Nead's deed and whether it complied with the agreement.

At the close of plaintiff's testimony, defendant moved the court to arrest the testimony and direct the jury to return a verdict for the defendant. This was overruled. At the conclusion of all the testimony, counsel for the defendant renewed

his motion for an instructed verdict in favor of the defendant and counsel for the plaintiff thereupon moved the court for an instructed verdict in favor of the plaintiff. The matter was argued, and the court announced that the defendant's motion was overruled and the plaintiff's motion was granted. Thereupon counsel for defendant offered to withdraw his motion, and asked the court to submit the case to the jury. The court refused to do so and instructed the jury to return a verdict in favor of the plaintiff, which was accordingly done. To the judgment rendered on this verdict, the defendant below prosecutes error.

The principal contention on behalf of the plaintiff in error is that he was deprived of his right to have the facts determined by a jury, and the case of *Perkins v. Putnam Co. (Comrs.)*, 88 Ohio St., 495, and the cases therein referred to, are cited in support of this position. An examination of these decisions shows that when the parties by motions on behalf of each side submit the case to the court and thereby clothe it with the functions of the jury, the request which must be made in order to divest the court of the powers arising in such a situation should be made before the final decision of the court.

In the case at bar, after the court had decided and granted the motion of the plaintiff for an instructed verdict, the return of the verdict by the jury prior to the rendition of judgment had become a mere formality. The court might have rendered the judgment without a verdict. See *Stockstill v. Dayton & M. Ry.*, 24 Ohio St., 83, and *Dick v. Railway*, 38 Ohio St., 389.

The application of the defendant after the final decision of the court came too late.

We have examined the other assignments of error, but do not find them well taken.

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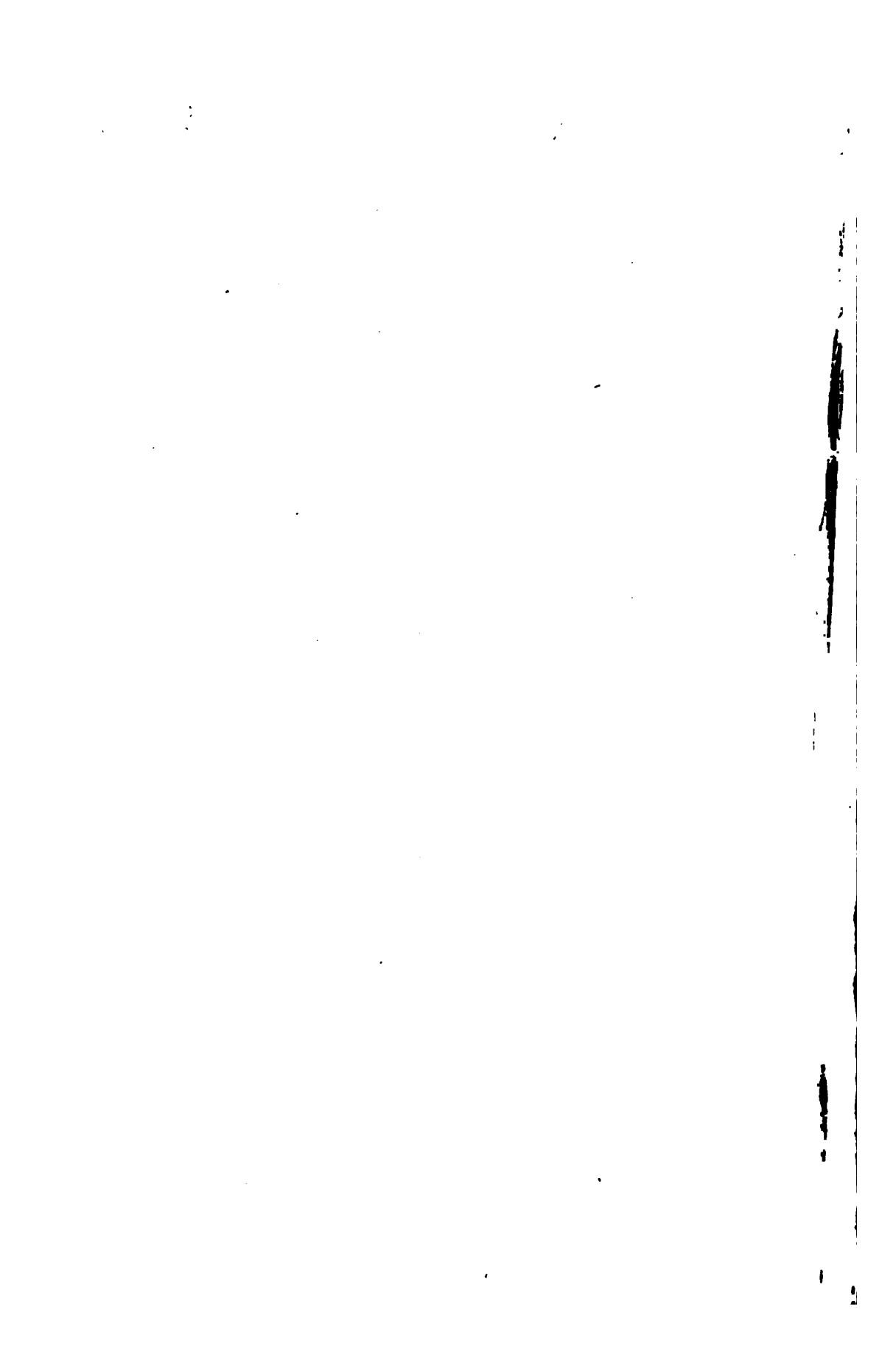






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